

The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

2010

Sexting or Self-Produced Child Pornography – The Dialogue Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response

Mary Graw Leary

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Criminal Law Commons](#)

Recommended Citation

Mary Graw Leary, Sexting or Self-Produced Child Pornography – The Dialogue Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response, 17 VA. J. SOC. POL'Y & L. 486 (2010).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

SEXTING OR SELF-PRODUCED CHILD PORNOGRAPHY? THE DIALOG CONTINUES - STRUCTURED PROSECUTORIAL DISCRETION WITHIN A MULTIDISCIPLINARY RESPONSE

Mary Graw Leary*

CONTENTS

Introduction	487
I. Clarifying Definitions: "Sexting" vs. Self-Produced Child Pornography	491
A. Self-Produced Child Pornography	491
B. "Sexting"	492
C. Self-produced Child Pornography and "Sexting": The Intersection	495
II. The Original Proposal: Structured Prosecutorial Discretion Within a Multidisciplinary Approach	496
A. The Thesis Proposed	496
B. Prosecution is Not the Solution to this Problem	497
III. New Information: The Frequency and Character of the Problem ..	499
A. Frequency	500
B. Nature of the Behavior	501
IV. How the Issue Is Misunderstood: The Sensationalism of the Debate	505
A. Overgeneralization	505
B. Structuring the Problem	506
1. Factually Distinguishing the Problem	506
2. Legally Distinguishing the Problem	509
C. Conceptualizing the Solution	510
1. Confusing a Rejection of Decriminalization with an Advocacy for Punishment	510
2. The Misunderstanding of Juvenile Court	514
a. Sex Offender Registration	515
b. Mandatory Minimum Sentences	518
V. The Future: Alternative Proposals	520
A. Threshold Issue: What's the Harm?	520
1. That the Pictures Themselves are Harmful is Consistent with Child Pornography Jurisprudence	523
a. <i>Ferber's</i> Factual Basis Supports This Concept of Harm	523
b. <i>Ferber's</i> Legal Analysis Supports This Concept of Harm ..	524
c. <i>Ashcroft</i> Does Not Alter This	526

* Associate Professor, The Catholic University of America, Columbus School of Law. With great thanks to so many who contributed their thoughts and insight- Susan Broderick, Tom Clancy, Howard Davidson, Susan Duncan, Christine Feller, Angel Flores, Roger Hartley, Amanda Cohen Leiter, Orin Kerr, Rev. Raymond C. O'Brien, John Rabun, and most especially Lisa Schiltz, and Cliff Fishman. For their research a special thanks to Jennifer Siegel, Kristen Kelley, and Steve Young and for the challenge of countless drafts to Julie Kendrick and the entire staff of the journal.

d. <i>Williams</i> Reasserts This as Well	529
e. Additional Harms Caused by the Images According to <i>Ferber</i>	532
2. That the Pictures Themselves are Harmful is Consistent with Contemporary Case Law Conceptualizing the Harm of Child Pornography.....	535
3. That the Pictures are Harmful in and of Themselves is Consistent with Practical Observations Regarding Self- Produced Child Pornography.....	539
B. Spectrum of Solutions.....	542
1. Formal Decriminalization.....	543
2. De Facto Decriminalization.....	547
3. Neither Form of Decriminalization is Adequate.....	550
4. Diversion and Prosecutorial Discretion.....	551
a. Structured Prosecutorial Discretion Within a Multidisciplinary Approach.....	551
b. Concepts of Prosecutorial Discretion	551
5. New Statutes.....	555
a. Balancing Concerns About Adjudication with Concerns About Exploitation	555
b. Focus on Mens Rea.....	557
c. New Crimes	558
6. Multidisciplinary Responses	558
a. New Jersey.....	560
b. New York.....	562
c. AWARE Act and SAFE Internet Act.....	562
7. Expansion of Current Laws	563
a. Nebraska's Affirmative Defense	563
b. Other Jurisdictions Recognizing the Issues	565
VI. Conclusion.....	566

The teenage practices of "sexting" and posting sexual images online are nationwide problems that have perplexed parents, school administrators, and law enforcement officials.¹

INTRODUCTION

Any social problem that exists at the intersection of adolescence, sex, technology, and criminal law compels strong reactions from all sides. This in many ways is a positive development, because it speaks to a passionate concern for the well being of young people. However, it often results in sensationalism and oversimplification of complex and multifaceted issues making it more difficult to discuss the problem rationally and productively.

¹ A.B. 4069, 213th Leg., 2d Reg. Sess. (N.J. 2008).

Such is the case with self-produced child pornography (“SPCP”) and “sexting.” In 2007, I identified and wrote about a small but growing problem, largely unnoticed on a national scale, of youths producing pornographic images of themselves or peers and the distribution of those images by these producers as well as others.² The article addressed the dilemma facing prosecutors of how to respond to the production and distribution of this material labeled “self-produced child pornography” now sometimes referred to (often inaccurately) as “sexting.”³ This article identified that the production and distribution of self-produced child pornography brought into conflict two lines of jurisprudence. The first line was child pornography law, specifically its recognition that child pornography images are harmful to children both within and outside the images. The second line was juvenile law’s recognition that juveniles are often less aware of the social harms their illegal behavior can cause and are less culpable. At the time of that writing the only laws seemingly available to prosecutors were child pornography laws. The reality that the production and dissemination of self-produced child pornography, is, under the law, the production and dissemination of illegal child pornography, forced the prosecutor to resolve this conflict.

Society, including prosecutors, can respond to self-produced child pornography in a variety of ways. One is to insist on a “zero tolerance” policy and to prosecute every case. Such an inflexible approach will in many cases, perhaps most cases, do far more harm than good. A second approach is to decriminalize self-produced child pornography all together. This would prevent a prosecutor from ever abusing his or her discretion to prosecute. The difficulty is that it would preclude a juvenile court adjudication even where the conduct is particularly egregious, and would deprive authorities of a useful ability to persuade a juvenile, and perhaps the juvenile’s parents, to participate in counseling, therapy, or some similar program. A third approach is for prosecutors to treat every case that arises on an ad hoc, make-it-up-as-we-go approach. The disadvantages of that approach are apparent: risk of being inconsistent, unfair, biased, and unconsidered. The fourth approach is for prosecutors, together with members of other disciplines, to create a protocol whereby a variety of factors—the nature of the offense, characteristics of the offender, and availability of other resources—are considered, in a systematic way, in deciding whether a juvenile court prosecution should be initiated.

My article in 2007 argued for this fourth approach, and spelled out the factors that should be considered. It did so at a time when self-

² Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Exploitation*, 15 VA. J. SOC. POL’Y & L. 1 (2007).

³ These terms are related but distinct. See *infra* Part I.

produced child pornography was just barely entering the public consciousness. Since then, it has become a topic of considerable attention. It has also been sensationalized in ways that seriously interfere with rational debate. Some believed then and now that this proposal can play a constructive part in that debate. Unfortunately, some have misread, and mis-cited it, to the effect that “Professor Leary advocates prosecution.” This article has several goals. The first is to reintroduce this concept of structured prosecution in the post “sexting” era. Doing so affords an opportunity to clarify the proposal and its parameters. Secondly, and more importantly, developments since 2007 have demonstrated anew that the approach advocated can play an important role in preventing abuses of prosecutorial discretion while giving society a useful and necessary tool in confronting this problem. This is particularly true with the creation of statutes specifically targeting this behavior; as opposed to only child pornography statutes. These alternatives combined with structured prosecutorial discretion are an important step forward.

The 2007 article sought to address the narrow question of whether prosecution should at times be considered as part of a multidisciplinary response, or should be eliminated altogether as an option regardless of the circumstances. The article concluded that the production or later distribution (by the subject of the image or others) of self-produced child pornography should not be decriminalized; rather, a prosecutor should retain the option to prosecute in those rare cases where appropriate. The article offered a structured prosecutorial discretion model within a larger multidisciplinary response. More precisely, the article rejected decriminalization but also rejected mandatory prosecution and exposure to sex offender registration.⁴ It rejected prosecuting a juvenile in adult criminal court, noting that on the rare occasion prosecution is considered, it only be considered in the rehabilitative setting of juvenile court.⁵ In particular, it rejected an ad hoc approach to discretion, and urged prosecutors to adopt the proposed protocol of research-based factors to guide the exercise of discretion should such a case arise.⁶ In so

⁴ Leary, *supra* note 2, at 48.

⁵ *Id.* at 45. The proper term for juvenile court prosecution is adjudication. These terms will be used interchangeably for the benefit of the reader.

⁶ *Id.* at 49. These factors were divided into two categories: offender based factors and offense specific factors. Offender based factors include, but are not limited to: age of the juvenile, cause behind the activity, presence or absence of support network to prevent repeating this behavior, amenability to rehabilitation, the frequency of this activity, and the likelihood of rehabilitative success. The offense specific factors include: circumstances surrounding the exploitation, whether the juvenile involved other juveniles, the role of the juvenile in the production, whether the production was commercial, whether the production was for profit, the extent of the dissemination, and the severity of the content.

doing, it envisioned that limited juvenile adjudication would be considered for only the most egregious of cases that demanded intervention in the interest of the youths affected. Such cases might include events implicating a sexual assault, surreptitious filming, massive distribution by a third party, or other serious circumstances.⁷

Since the article was published much has occurred that compels revisiting this issue. First, much more has been learned about the activity of SPCP, both in its scope and context. Second, the phenomenon of this behavior reached the mainstream media and national discussion ensued. The media reported heavily, and at times sensationally, on this activity bestowing on it a catchy headline-friendly label: “sexting.” Examples of investigations and legal proceedings followed as more communities and prosecutors tried to address this growing problem.⁸ Third, many state legislatures have proposed a middle ground of alternative charges to address self-produced child pornography which afford prosecutors more appropriate options.

The time is ripe to explore this issue further, considering the newly collected information regarding the behavior, its frequency, and motives behind it. Furthermore, many stakeholders have joined the discussion offering novel, provocative, or more traditional suggestions as to the proper response which compel analysis. Part I of this article will begin by addressing the implications of the unfortunate use of the word “sexting” to describe a wide range of activities. Part II will outline the goal of the original article: to answer the narrow legal questions of decriminalization by proposing a solution of structured prosecutorial discretion within a larger multidisciplinary response. Part III will examine new information learned since that article. Part IV will highlight how the issue and ensuing national debate has been sensationalized and misunderstood. Part V will examine some new voices in the debate and offer analysis of pending and enacted

⁷ See *id.* at 50.

⁸ See, e.g., Adam Bowles, *Montville schools study cyberharassment, ‘sexting’*, NORWICH BULLETIN, Sept. 30, 2009, available at <http://www.norwichbulletin.com/news/x1699607602/Montville-schools-study-cyberharassment-sexting> (high school student charged with breach of peace and harassment after posing as a female student and obtaining sexually explicit photos from other male students); Dawn White, *Perry County Teens Face Charges for Sexting*, WPMT-TV, Oct. 1, 2009, available at <http://www.fox43.com/news/wpmt-amnews-sexting-pennntp-10-1-09,0,4092091.story>; *Pender County Student Faces Serious Charges After Sexting Incident*, WWAY, Sept. 10, 2009, available at <http://www.wwaytv3.com/node/18190>; Alexis Huicochea, *2 local boys face misdemeanor ‘sexting’ charges*, ARIZONA DAILY STAR, Aug. 27, 2009 (on file with The Virginia Journal of Social Policy & the Law). Sadly, as with many national dialogues which take place in the forum of media and blogs, much of this discussion was sensationalized.

legislation, placing these solutions on a continuum of proposals and concluding that these new lesser charges combined with a structured prosecutorial discretion are a positive development in that they avoid too strong a sanction but retain a legal response when unavoidable.

I. CLARIFYING DEFINITIONS: "SEXTING" VS. SELF-PRODUCED CHILD PORNOGRAPHY

Before an intelligent discussion of the practice of self-produced child pornography can occur, clarity must be established regarding terms. At the time of the original article there was no word or phrase to describe this behavior and "self-produced child pornography" was adopted. However, since that time, the media has adopted another term for some forms of this behavior: "sexting." The terms must be distinguished.

A. SELF-PRODUCED CHILD PORNOGRAPHY

The focus of this and the original article is self-produced child pornography images. That is to say such images that possess the following criteria: they meet the legal definition of child pornography and were originally produced by a minor with no coercion, grooming, or adult participation whatsoever.⁹ The article limits its focus to images that meet the definition of child pornography because the illegal nature of those images is what creates the dilemma for the prosecutor.¹⁰ Child pornography definitions vary, but the federal definition will suffice for this discussion. Federally, child pornography constitutes visual depictions of actual children engaged in "sexually explicit conduct." "Sexually explicit conduct" includes generally "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person."¹¹ It is important to note that the "self" referred to in self-produced child pornography is the subject of the image. However, the person who creates the image may be different than one who possesses it or distributes it.¹² In other words, this article does not focus exclusively on the juvenile who makes an image of him or herself. Rather it also

⁹ Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 4 (2007).

¹⁰ See *infra* Part V for a discussion of new statutes which may make other images illegal.

¹¹ 18 U.S.C. § 2256(2)(A) (2006).

¹² Once distributed, a subsequent possessor could simply be referred to as possessing child pornography.

addresses the juveniles in the distribution chain who may coerce production, or later possess, distribute, or utilize such images.¹³

B. "SEXTING"

The term "sexting" is not a legal term and seems to have become a celebrated media label within the United States within the last two years.¹⁴ The media has used the term without a consistent definition¹⁵ to over-generalize and place under one heading such diverse behaviors as (a) one minor sending one picture to a perceived significant other;¹⁶ (b) a minor taking and/or distributing pictures of him or herself and others engaged in sexually explicit conduct;¹⁷ (c) a minor extensively forwarding or disseminating a nude picture of another youth without her knowledge,¹⁸ (d) a minor posting such pictures on a web site;¹⁹ (e) an

¹³ Indeed, under the structured prosecutorial discretion model, the latter can be of greater concern than the former who risks the most harm.

¹⁴ See, e.g., National Center for Missing & Exploited Children, *Policy Statement on Sexting*, (Sept. 21, 2009), available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130 ("Sexting is a term coined by the media . . ."); Parry Aftab, *Protect Our Children: Harassed and Vulnerable* (ABC television broadcast, Apr. 28, 2009), available at <http://abclocal.go.com/wabc/story?section=news/local&id=6063718>.

¹⁵ While the term "sexting" has reached massive success among headlines and news stories, this article urges professionals to use the more precise term of self-produced child pornography. The term "sexting" is problematic for two reasons. First, by playing on the words "texting" and "sex" the term glamorizes this potentially illegal and destructive behavior. Second, it sensationalizes a serious multi-level problem, ignoring potentially devastating negative effects to those involved.

¹⁶ *Whitnall 'Sexting' Investigation Expands*, WISN, Oct. 7, 2009 (former boyfriend forwarded nude pictures of fourteen-year-old girl to other males), available at <http://www.wisn.com/news/21233385/detail.html>; Pat Sherman, *Peer Educators Shock Teens Awake to Problems in Cyberspace*, SAN DIEGO UNION TRIB., May 9, 2009, available at <http://www3.signonsandiego.com/news/2009/may/09/mz1mc9peer22377-peer-educators-shock-teens-awake-p/> (quoting a student stating that "girls are often coerced into sending nude photos to their boyfriends").

¹⁷ See, e.g., Kelli Wynn, *Middle School Student Won't Be Charged For Sexting*, DAYTON DAILY NEWS, Mar. 24, 2009, available at <http://www.daytondailynews.com/localnews/content/oh/story/news/local/2009/03/24/ddn032409sextingweb.html?cxtype=rss&cxcat=16>.

¹⁸ E.g., Alexis Huicochea, *2 local boys face misdemeanor 'sexting' charges*, ARIZONA DAILY STAR, Aug. 27, 2009 (on file with The Virginia Journal of Social Policy & the Law); Colleen Chen, *Police Investigate Stillwater Teens for 'Sexting'*, KOTV, Nov. 3, 2009, available at <http://www.newson6.com/Global/story.asp?S=11438915>; Catey Hill, *Eighth-Grade Boy Sells Nude 'Sexts' of Girlfriend for \$5 A Piece*, NY DAILY NEWS.COM, Mar. 9, 2010, available at <http://www.nydailynews.com>.

older teen asking (or coercing) another youth for such pictures;²⁰ (f) a person impersonating a classmate to dupe and or blackmail other minors into sending pictures,²¹ (g) adults sending pictures or videos to minors or possessing sexually explicit pictures of juveniles,²² and (h) adults

[p://www.nydailynews.com/news/2010/03/09/2010-03-09_eighthgrade_boy_allegedly_sells_nude_sexts_of_girlfriend_for_5_a_piece.html](http://www.nydailynews.com/news/2010/03/09/2010-03-09_eighthgrade_boy_allegedly_sells_nude_sexts_of_girlfriend_for_5_a_piece.html).

¹⁹ E.g., Associated Press, *Girl Posts Nude Pics, Is Charged With Kid Porn*, MSNBC, Mar. 27, 2009, available at <http://www.msnbc.msn.com/id/29912729>.

²⁰ E.g., *Teen 'Sexting' Is Part of the (Too Much) Information Age*, FORT WORTH STAR-TELEGRAM, Dec. 22, 2009, available at <http://www.thehour.com/story/479872> (discussing pressure for nude pictures); Pat Sherman, *Peer Educators Shock Teens Awake to Problems in Cyberspace*, SAN DIEGO UNION-TRIB., May 9, 2009, available at <http://www3.signonsandiego.com/news/2009/may/09/mz1mc9peer22377-peer-educators-shock-teens-awake-p/> (quoting a student stating that "girls are often coerced into sending nude photos to their boyfriends").

²¹ E.g., Adam Bowles, *Montville Schools Study Cyberharassment, 'Sexting'*, NORWICH BULLETIN, Sept. 30, 2009, available at <http://www.norwichbulletin.com/news/x1699607602/Montville-schools-study-cyberharassment-sexting> (referring to a male student posing as a female student and exchanging pictures); *Student To Spend 1 Year In Juvenile Detention For Sexting*, WISN, Jan. 13, 2010, available at <http://www.wisn.com/news/22228269/detail.html>.

²² E.g., Lori Monsewicz, *Lake Township Teen Accused Of 'Sexting' 15-Year-Old Girl*, CantonRep.com., Sept. 11, 2009, available at <http://www.cantonrep.com/homepage/x1420196138/Lake-Township-teen-accused-of-sexting-15-year-old-girl> (reporting 18-year-old sending nude pictures to 15-year-old); Charlie Butts, *Sexting Teen Ends Up On Sex Offender Registry*, ONENEWSNOW, Sept. 24, 2009, available at <http://www.onenewsnow.com/Legal/Default.aspx?id=692314> (discussing Iowa Supreme Court affirmance of 18-year-old's conviction for distributing obscene materials to minors); *Teen Gets Jail in Sexting Case*, WPTZ, Sept. 3, 2009, available at <http://www.wptz.com/news/20705763/detail.html> (referring to guilty plea of 18-year-old to promotion of sexual recording for instructing victims to film the performance of sexual acts); Mike James, *Teacher Loses His License For Alleged Sexting*, DAILY INDEPENDENT, Nov. 27, 2009, available at http://www.dailyindependent.com/local/local_story_331235502.html (reporting teacher sent sexually charged text to 14-year-old girl); *School Employee Investigated for 'Sexting,' Police Say*, KOAT Albuquerque, Nov. 9, 2009, available at <http://www.koat.com/news/21565850/detail.html>; *Pasco sex offender accused of 'sexting' teen*, ST. PETERSBURG TIMES, Sept. 24, 2009, available at <http://www.tampabay.com/news/publicsafet/y/crime/pasco-sex-offender-accused-of-sexting-teen/1038910> (reporting man sending genital pictures and soliciting sex acts from 15-year-old girl); Kyle Alsopach, *Accused Brockton High 'Sexting' Student Pleads Not Guilty, Released Without Bail*, TAUNTON DAILY GAZETTE, Jan. 13, 2010, available at <http://www.tauntongazette.com/education/x370523966/Accused-Brockton-High-sexting-student-pleads-not-guilty-released-without-bail>; *New York Man Charged with Mass Sexting of Pennsylvania Teens*, ASSOC. PRESS, Mar. 15, 2010, available at http://www.silive.com/news/index.ssf/2010/03/new_york_man_charged_with_mass.html.

sending sexually suggestive text or images to other adults.²³ These are all very different behaviors, some of which can be legal, others clearly violations of child pornography law, and others, illegal under different crimes such as online enticement²⁴ or sending obscene material to minors.²⁵

While originally without a definition, in 2009, the editors of the Oxford English Dictionary recognized the term “sexting” and defined it as “the sending of sexually explicit texts and pictures by cellphone.”²⁶ This is not a legal definition and its use in discussing legal issues is problematic in many ways. The definition does not reference the legal definition of “sexually explicit,” thus its meaning is vague and subjective.²⁷ Furthermore, it includes texts, as opposed to the legal limitation of child pornography to visual depictions.²⁸ Additionally, the Oxford definition is not limited to images involving youth. Finally, it is limited to only the use of cell phones and presumably would not include smart phones, laptops with web cameras, and other computer devices with visual depiction capabilities.

²³ E.g., Courtney McCann, *Mating Dating / Even Adults Are Getting into Racy Texting*, THE PRESS OF ATLANTIC CITY, Oct. 3, 2009, at B1, (on file with The Virginia Journal of Social Policy & the Law), available at 2009 WLNR 19538658; Aaron Gouveia, *Hearing Held on Falmouth ‘Sexting’ Allegation*, CAPE COD TIMES, Sept. 10, 2009, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20090910/NEWS/909100315>.

²⁴ E.g., Ashley Smith & Kevin Leininger, *Lutheran Teacher Charged In ‘Sexting’*, THE NEWS-SENTINEL, Dec. 1, 2009, available at <http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20091201/NEWS/912010335> (child solicitation).

²⁵ E.g., *State v. Canal*, 773 N.W.2d 528, 533 (Iowa 2009) (affirming conviction after disseminating obscene materials to minors); *Ex Teachers Assistant Gets One Year For Sexting*, WVKY LEXINGTON NEWS, Sept. 17, 2009 (sending lewd messages to a minor) (on file with The Virginia Journal of Social Policy & the Law); Shaun Byron, *Former Clarkston Teacher Gets 90 Days for ‘Sexting’*, THE OAKLAND PRESS, Dec. 11, 2009, available at http://www.theoaklandpress.com/articles/2009/12/11/news/cops_and_courts/doc4b2217226360a600263686.txt.

²⁶ See Oxford University Press, *Oxford Word of the Year 2009: Unfriend*, Nov. 16, 2009, <http://blog.oup.com/2009/11/unfriend> (last visited Mar. 9, 2010); *A word with ‘lex appeal’*, CHI. TRIB., Nov. 18, 2009, at 19; available at 2009 WLNR 23240767.

²⁷ According to the OXFORD DICTIONARY OF ENGLISH, Vol. V, p. 572 (2d ed. 2005), “sexually” means “in a sexual manner, by means of sexual congress.” While “explicit” is defined as “developed in detail; hence, clear, definite.” *Id.* at Vol. XV, p. 116. Federal law is much more precise. See 18 U.S.C. § 2256(2)(A) (2006), *supra* note 11.

²⁸ See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography limited to “works that visually depict”); 18 U.S.C. § 2256(8) (2006) (defining “child pornography” as “a visual depiction”).

The National Center for Missing and Exploited Children (NCMEC) developed a Policy Statement on “sexting” in late 2009.²⁹ NCMEC notes that the term “sexting” “generally refers to youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers.”³⁰ NCMEC’s definition, therefore, includes text messages but excludes adults. Significantly, however, it highlights two important aspects of this behavior often overlooked. First, NCMEC notes that there are four roles in every “sexting” or SPCP case. These include the person or people depicted in the picture, the person or people taking the picture, the person or people possessing the picture, and the person or people distributing the picture.³¹ Secondly, depending upon the facts of the situation, one person may assume more than one of these roles and in other situations one role is taken on by multiple people.³² Notwithstanding these two more clear definitions of “sexting,” in the Oxford dictionary and NCMEC’s statement, one must be cautious in the term’s use, as it is not uniformly utilized.

C. SELF-PRODUCED CHILD PORNOGRAPHY AND “SEXTING”: THE INTERSECTION

The terms “sexting” (whichever definition is being used) and self-produced child pornography may be overlapping, but they are not synonymous. Child pornography must be a visual image, and so does not include “sexting” by text without images. However, not all images which are “sexted” are self-produced child pornography. Only those images which meet the legal definition of child pornography fall within that category. Similarly, some self-produced images are never electronically distributed to others and are also not under the umbrella of “sexting.”

Objections surfaced to the use of the term “sexting” as inappropriately sensationalizing this potentially dangerous activity.³³ The

²⁹ NCMEC’s voice in this discussion is critical as it operates the “CyberTipline” which as of Sept. 21, 2009, has handled over “731,000 reports of child sexual exploitation and its Child Victim Identification Program has reviewed and analyzed more than 26,847,700 child pornography images and videos.” The National Center for Missing & Exploited Children, *What is Sexting? Why is it a Problem? What Parents and Teens Need to Know* (Sept. 21, 2009), available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4131.

³⁰ The National Center for Missing & Exploited Children, *Policy Statement on Sexting*, (Sept. 21, 2009), available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

³¹ *Id.*

³² *Id.*

³³ E.g., Mary Graw Leary, *The Right and Wrong Responses to “Sexting,”* THE PUBLIC DISCOURSE : ETHICS, LAW, AND THE COMMON GOOD (May 19, 2009),

term self-produced child pornography is preferable to “sexting” because, like the term “child abuse images,” it accurately conveys the content. Secondly, as discussed, it distinguishes between the kinds of images produced (i.e. pornographic or merely suggestive).

II. THE ORIGINAL PROPOSAL: STRUCTURED PROSECUTORIAL DISCRETION WITHIN A MULTIDISCIPLINARY APPROACH

A. THE THESIS PROPOSED

The original article attempted to accomplish specific goals. First, it sought to examine the question of whether prosecution should remain on the table or be disregarded, thereby decriminalizing self-produced child pornography.³⁴ Secondly, this examination included a review of both current research and the purposes underlying juvenile justice and child pornography policies. Finally, it proposed a workable framework for prosecutors to adopt.

The article examined the issue from legal, research-based, and multidisciplinary perspectives, concluding that self-produced child pornography should be neither decriminalized nor subjected to mandatory juvenile adjudication.³⁵ The approach can be labeled explicitly structured prosecutorial discretion within a multidisciplinary societal response.³⁶

<http://www.thepublicdiscourse.com/2009/05/227/>; Editorial, *Words that Fail Us*, LAS VEGAS SUN, Jan. 9, 2010.

³⁴ Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 6 (2007) (“This article explores [society’s dilemma to craft an appropriate response] and argues that juvenile prosecution should be considered, although not mandated, as a viable response to juvenile self-exploitation.”).

³⁵ *Id.* (“Part IV proposes that the proper societal response to the production, possession, and/or distribution of child pornography by minors include the possibility of prosecution in the juvenile court system.”) (emphasis added); *Id.* at 42 (*allowance* of prosecution) (emphasis added); *Id.* at 6 (arguing that “juvenile prosecution should *be considered, although not mandated*, as a viable response to juvenile self-exploitation.”) (emphasis added).

³⁶ *Id.* at 49-50 (“[I]t will allow the state to have an array of alternative responses to this significant social ill, thus affording the state the discretion to determine if prosecution is required [or] another remedy is more appropriate.”); *Id.* at 42 (“[A] multi-disciplinary response is critical to all child abuse cases....”); *Id.* at 39 (stating that the situation demands “that prosecution *be included* as a societal tool to combat this societal ill.”) (emphasis added); *Id.* at 26 (“[W]hatever the government response is [it] should be *multidisciplinary*, including input from mental health professionals, child protective services, and social workers as well as law enforcement, and the judiciary.”) (emphasis added).

Structured prosecutorial discretion's goal is to allow society the option of adjudication in the most egregious of cases with an aim toward rehabilitation, while at the same time allowing prosecutors the discretion to divert or elect not to charge when appropriate. Its characteristics include a rejection of decriminalization, but also a rejection of both sex offender registration and mandatory adjudication. However, this proposal also rejects an ad hoc approach to such cases, favoring a research-based protocol grounded in objective factors. If a prosecutor unexpectedly inherits a case of SPCP without having considered in advance how to proceed in such matters, his or her response is likely to be instinctive, reflexive, and perhaps overly punitive. Therefore, the proposal calls upon prosecutors' offices to establish in advance a guide to that discretion. Doing so will increase the likelihood that the prosecutor's response will be measured and appropriate. Such a protocol includes factors to be considered in differentiating between prosecutable and divertible cases.³⁷ Those factors are designed to systemically differentiate the juvenile whose infraction is seemingly minor from the juvenile whose actions are significantly damaging to him or her or others. The first category of factors concerns "offender based" factors: the juvenile's age, cause behind the activity, presence or absence of a support network to prevent repeating this behavior, amenability to rehabilitation, the frequency of this activity, and the likelihood of rehabilitative success.³⁸ The second category includes offense specific factors: circumstances surrounding the exploitation, whether the juvenile involved other juveniles, the role of the juvenile in the production, whether the production was commercial, whether the production was for profit, the extent of the dissemination, and the severity of the content.³⁹ These factors are central to the prosecutorial role. Such an approach encourages systemic prosecutorial discretion that results in only the most severe cases being considered for adjudication, and those only in juvenile court without the risk of sex offender registration.

B. PROSECUTION IS NOT THE SOLUTION TO THIS PROBLEM

The problem of self-produced child pornography is a complex one, involving aspects of child development, child sexuality, child

³⁷ Leary, *supra* note 34, at 6-7 ("[T]his article proposes parameters for implementing a protocol to address such criminal, yet complex, behavior."); *Id.* at 48 ("This article does not suggest that juvenile prosecution be a mandatory consequence. Rather, jurisdictions should develop a protocol which includes: (1) juvenile prosecution as an option, and (2) factors to consider in determining if an individual case deserves that response....Factors must be determined not only from a law enforcement investigation, but from also a multi-disciplinary inquiry as is the model for all child abuse cases. This would shed light not only on the crime itself, but also on the possible reasons for the juvenile's actions.").

³⁸ *Id.* at 48-49.

³⁹ *Id.* at 49.

exploitation, education, and parenting, among others. The solution is multidisciplinary and not exclusively prosecutorial. The question then becomes whether, within the constellation of disciplines included in the societal response, prosecution should be used to respond to the social problem. The original article proposed an inclusion of structured prosecutorial discretion which

will allow the state to have *an array of alternative responses* to this significant social ill, *thus affording the state the discretion to determine if prosecution is required [or] another remedy is more appropriate. . . .* While prosecution *may not be necessary in every instance of self-exploitation, prosecutors should include it in their arsenal to prevent child sexual exploitation.*⁴⁰

A portion of the solution is for society and its institutions (educational, social service, religious, law enforcement, legal, and civic), to come together and form a considered strategy that encourages prevention and a smart response when prevention fails. When child pornography prevention fails, the proper response rests not with any one social institution, including the prosecutor's office. The 2007 article advocated embracing all of the tools at society's disposal, and discouraged eliminating any one tool.

The result of the use of such a protocol would be that the type of youth who may face prosecution would (a) not be exposed to sex offender registration because of the self-produced pornography; and (b) would include only the most egregious of offenders but not those who committed one-time youthful indiscretions.⁴¹

⁴⁰ *Id.* at 48-50 (emphasis added).

⁴¹ This is in accordance with Professor Smith's view that prosecution should not be used "except in extreme circumstances." Stephen F. Smith, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 522 (2008). Any possible collateral consequence of a juvenile court adjudication should be limited, as in Vermont, to parameters of juvenile court (i.e., confidentiality, expungement). *See infra* note 99.

III. NEW INFORMATION: THE FREQUENCY AND CHARACTER OF THE PROBLEM

When the original article was published, little was known about how frequently self-produced child pornography was created and/or disseminated and the practice largely escaped general notice. Since then, attempts have been made to acquire useful information. To date, those attempts have been of limited utility, but can provide some insight. In December 2008 the National Campaign to Prevent Teen and Unplanned Pregnancy in conjunction with research partners released a survey entitled, *Sex and Tech, Results from a Survey of Teens and Young Adults*.⁴² This survey, as opposed to a study,⁴³ was “an effort to better understand the intersection between sex and cyberspace” and sought to “quantify the proportion of teens and young adults that are sending or posting sexually suggestive text and images.”⁴⁴ One result of the survey received a great deal of press coverage, that approximately 20% of teens participating had posted online nude or semi-nude pictures or video of themselves. Although the survey’s methodology received criticism, it was the first in a series of surveys conducted over the following year on this topic.⁴⁵ Cox Communications, Harris Interactive, and NCMEC released a survey entitled *Teen Online & Wireless Safety Survey Cyberbullying, Sexting, and Parental Controls*.⁴⁶ This survey of a similar-sized sample of teens explored teens’ online and cell phone behavior. In December 2009, the Associated Press and MTV released another online survey targeting the examination of “digital abuse.”⁴⁷ Also in December 2009, the Pew Research Center, as part of its Internet and American Life Project, released the report *Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging*.⁴⁸

⁴² The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, (2008), http://www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf [hereinafter National Campaign].

⁴³ Carl Bialik, *Which Is Epidemic – Sexting or Worrying About It?* WALL ST. J., Apr. 8, 2009, available at <http://online.wsj.com/article/SB123913888769898347.html>.

⁴⁴ National Campaign, *supra* note 42, at 1.

⁴⁵ There has been criticism of these results as possibly inflated. See, e.g., Bialik, *supra* note 43. This survey was of 1,280 people, 653 of whom were ages 13-19. National Campaign, *supra* note 42, at 1. Participants completed the online survey through a magazine website aimed primarily at girls, Cosmogirl.com.

⁴⁶ Cox Communications, *Teen Online & Wireless Safety Survey Cyberbullying, Sexting, and Parental Controls*, (May 2009), available at http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf [hereinafter Cox Survey]. This survey sampled 655 American teenagers ages 13-18.

⁴⁷ *A Thin Line: 2009 AP-MTV Digital Abuse Study Executive Summary* (Dec. 2009), available at http://www.athinline.org/MTV-AP_Digital_Abuse_Study_E

Although these surveys provide some useful information, they can also contribute to confusion because definitions of what each survey examined differed considerably. Each defined “sexting” differently and included behavior that constituted and failed to constitute child pornography.⁴⁹

A. FREQUENCY

Notwithstanding these definitional distinctions, these surveys provide some information as to the frequency of the “sexting” or SPCP. The National Campaign study found that approximately 20% of teens surveyed posted nude or semi-nude pictures of themselves online, which is similar to Cox’s conclusion that 19% of teens surveyed have sent, received, or forwarded sexually suggestive nude or nearly nude photos through text messaging or email.⁵⁰ In the MTV Survey, 24% of teens between fourteen and seventeen report being involved in “some type of naked sexting,” the roles of which were not clarified.⁵¹ A smaller number, 13% of girls and 9% of boys, reported sharing naked photographs or video images of themselves.⁵² However, males were

xecutive_Summary.pdf [hereinafter MTV Survey] (covering 1,247 participants ages 14-24); *The MTV-Associated Press Poll: Digital Abuse Survey*, Sept. 23, 2009, available at http://surveys.ap.org/data%5CKnowledgeNetworks%5CAP_Digital_Abuse_Topline_092209.pdf (last visited on Mar. 22, 2010) [hereinafter MTV-AP Poll].

⁴⁸ Amanda Lenhart, *Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging*, Pew Research Center (Dec. 15, 2009), available at <http://www.pewinternet.org/Reports/2009/Teens-and-Sexting.aspx> [hereinafter Pew Survey].

⁴⁹ The National Campaign explored the sending or posting of sexually suggestive pictures or video, defined as “semi-nude or nude personal pictures/video taken of oneself and not found on the Internet or received from a stranger (like spam), etc.” National Campaign, *supra* note 42, at 5. Cox defined “sexting” somewhat differently as “sending sexually suggestive text messages or emails with nude or nearly-nude photos.” Cox Survey, *supra* note 46, at 5. Neither study defined “nearly nude” and Cox included sexually suggestive emails or text messages. MTV examined more broadly “digitally abusive behavior,” and embraced within that category 17 behaviors, including sharing an email or instant message the youth sent with other people, putting embarrassing pictures or video of the youth on the Internet without his or her permission, taking sexual photos without the youth’s knowledge and sharing them, and pressuring youth to take naked pictures or video. MTV Survey, *supra* note 47, at 6 n.1; MTV-AP Poll, *supra* note 47, at 11-12. The Pew Survey questioned teens concerning the sending or receiving of “sexually suggestive nude or nearly nude photos or videos of themselves or of someone they knew on their cell phones.” Pew Survey, *supra* note 48, at 7.

⁵⁰ National Campaign, *supra* note 42, at 1; Cox Survey, *supra* note 46, at 34.

⁵¹ MTV Survey, *supra* note 47, at 2.

⁵² *Id.*

more likely than females to receive a picture that has been “passed around.” Fourteen percent of males and 9% of females report doing so.⁵³ The Pew Survey found that only 4% of cell phone-owning teens between twelve and seventeen reported sending a sexually suggestive nude or nearly nude photo or video of themselves. Fifteen percent however reported receiving such an image, with older teens more likely than younger to receive such images.⁵⁴ So it appears that the further dissemination is more common than the initial production.

B. NATURE OF THE BEHAVIOR

While ranges of this activity span from 4-20% of surveyed youth, these variations depend in part on what exactly was being polled, the groups polled, and the definitions. Accepting these variations and limitations, it is safe to say that a measurable portion of youth is either sending such pictures of themselves, or more likely possessing and/or distributing such pictures of others. Any societal response to this should understand why this is occurring.⁵⁵

This behavior seems to be connected often, although sometimes rather loosely, to the dating activity and/or romantic interests of youths.⁵⁶ In the National Campaign Survey 71% of girls and 67% of boys who have sent sexually suggestive content have done so to a boyfriend or

⁵³ *Id.*

⁵⁴ Pew Survey, *supra* note 48, at 5. Although not a random sample, NCMEC Child Victim Identification Program estimates that 14% of images in which they can identify the victim and are aware of the circumstances of production are self-produced, although not necessary “sexted” or distributed images. NCMEC Power Point Slides, *Relationship of Abuser to Child* (Dec. 2009) (on file with The Virginia Journal of Social Policy & the Law).

⁵⁵ The focus groups in the Pew Survey describe three basic “sexting” scenarios (1) pictures shared or forwarded between two romantic partners “in lieu of, as a prelude to, or as part of, sexual activity;” (2) images sent between friends or between two people where at least one person is hoping to become romantically involved; (3) images forwarded with or without the subject’s knowledge to others. Pew Survey, *supra* note 48, at 6-8.

⁵⁶ While the perception is that more girls are sending images to boys, the numbers are less clear. The Cox Survey reports the demographics of young people engaged in “sexting” is closely split 53% girls and 47% boys. Cox Survey, *supra* note 46, at 33. However, senders of such images and text are more likely to be girls (65% girls and 35% boys). *Id.* This is in contrast to the National Campaign which reported approximately an even split (22% of girls and 18% of boys) sending nude or semi-nude pictures of themselves. National Campaign, *supra* note 42, at 1. MTV reported females were slightly more likely to share naked photos or video of themselves (13%) than males (9%). MTV Survey, *supra* note 47, at 2. However, males were more likely to receive a forwarded image (14% v. 9%). *Id.*

girlfriend.⁵⁷ Twenty-one percent of these female teens and 39% of these male teens who have engaged in this behavior reported to the National Campaign and 24% of such teens reported to MTV that they did so to someone they “wanted to date or hook up with.”⁵⁸ This is similar to the Cox Survey in which 60% of “sext” senders reported doing so to a girlfriend or boyfriend and 21% to someone on whom they “had a crush.”⁵⁹

While some characterize this motivation as likely harmless,⁶⁰ the sending of such images, even in this context, has some disturbing implications about pressure or solicitation to do so, at times from strangers. Among MTV Survey “sext” senders, 61% of them said they felt pressure to send the images because someone asked them to do so.⁶¹ The PEW, MTV and National Campaign surveys all indicate pressure on teens, specifically girls, by others to send pictures.⁶² This is consistent with our growing awareness of teen dating violence which appears to be on the increase.⁶³ Some preliminary research claims to support a concern

⁵⁷ National Campaign, *supra* note 42, at 2.

⁵⁸ *Id.*; MTV Survey, *supra* note 47, at 2 (24%); MTV-AP Poll, *supra* note 47, at 14 (25%).

⁵⁹ Cox Survey, *supra* note 46, at 36.

⁶⁰ See, e.g., Juvenile Law Center and American Civil Liberties Union of Pennsylvania Joint Position Statement on HB 2189 and Other Efforts to Criminalize Teen Sexting, (2010), available at www.jlc.org/files/JLC_ACLU_Sexting_Statement.pdf (referring to posting nude and semi-nude video as *inter alia* “explor[ing] their sexual identity”); Rosemary Black, *Sexting: Just A Modern Version of Spin the Bottle*, NEW YORK DAILY NEWS, May 27, 2009, available at http://www.nydailynews.com/lifestyle/2009/05/27/2009-05-27_sexting_just_a_modern_version_of_spinthebottle.html.

⁶¹ MTV Survey, *supra* note 47, at 2. Among Cox “sext” senders, 43% did so because someone asked them to do so. Cox Survey, *supra* note 46, at 37. Although an almost as high number did so “to have fun.” *Id.*

⁶² The PEW Forum groups also reference pressure to send such pictures often from a romantic partner or peer. Pew Survey, *supra* note 48, at 8. MTV reported that 61% of those who have sent such a picture have been pressured to do so. MTV Survey, *supra* note 47, at 2. Fifty-one percent of teen girls in the National Campaign reported “pressure from a guy is a reason girls send sexy messages or images.” National Campaign, *supra* note 42, at 4. Among the teens who reported sending sexually suggestive content in the National Campaign Survey, 12% of teen girls reported feeling pressured to do so. *Id.*

⁶³ The National Center for Victims of Crime reports “approximately 1 in 5 high school girls reports being abused by a boyfriend” and “1 in 3 teen dating relationships” contain “physical aggression.” *Teen Dating Violence Fact Sheet*, THE NATIONAL CENTER FOR VICTIMS OF CRIME, available at <http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspx?DocumentID=38057> (last visited on Mar. 22, 2010) (citing, Jay G. Silverman, et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001) and (Avery-Leaf and Cascardi, *Dating*

about the dynamic of self-produced child pornography and coercion.⁶⁴ The role of technology in this has caused concern that technology is being used as part of teen violence.⁶⁵ The Love is Not Abuse program, and initiatives from the Centers of Disease Control and private industry partners, note that “sexting” is “increasingly being used as a weapon of violence in teen dating relationships.”⁶⁶

Disturbingly, youth also report sending such images to people they have never met in person or did not know.⁶⁷ An important aspect of the

Violence Education Preventing Violence in Relationships, American Psychological Association (2002)). The National Teen Dating Abuse Helpline asserts that first calls and online chat increased 600% between March 2007 and March 2009. See Katie Couric, *Thirty Percent of Teens Report Abuse in Relationships*, CBS EVENING NEWS, Dec. 3, 2009, available at <http://www.cbsnews.com/stories/2009/12/03/eveningnews/main5880975.shtml>; see also Love is Respect, available at <http://www.loveisrespect.org> (last visited March 3, 2010) (abuse hotline website).

⁶⁴ Elizabeth Englander, *Sexting, Blackmail*, BOSTON GLOBE, Jan. 18, 2010, available at http://www.boston.com/bostonglobe/editorial_opinion/letters/articles/2010/01/18/sexting_blackmail/ (asserting that her preliminary research indicates 25% of youth reported being coerced into sending nude or partially nude pictures).

⁶⁵ CEO of Texas Council of Family Violence, Sheryl Cates recently stated “Teens are primarily using technology and that has changed the dynamics in terms of the abuse that we’re seeing.” Couric, *supra* note 63. See also Larry Magid, *Technology and Teen Dating Abuse*, (Dec. 8, 2009), available at <http://mi.o2.ie/www.safeteens.com/2009/12/08/technology-and-teen-dating-abuse/> (“Though technology doesn’t cause nor necessarily play a role in teen dating violence, it clearly can amplify the problem.”); Jake Griffin, *Indiana Sexters Face Social; Legal Consequences*, ARTESIAN HERALD, Oct. 2, 2009, available at http://msdadmin.scican.net/mhs/mhs_area_artesian_herald/Artesian_Herald_Volumes/20092010/issue_2/MHSA03-BW-1002.pdf. The Texas Attorney General recently made this link between “sexting” pressures and teen dating violence. *Attorney General Abbott Observes Teen Dating Violence Awareness Prevention Month*, THE ANAHUAC PROGRESS, Feb. 11, 2010, available at <http://www.theanahuacprogress.com/articles/2010/02/11/news/news23.txt>.

⁶⁶ Richard Webster, *New Digital Dating Abuse Curriculum Being Released on Capitol Hill; Free to Teachers and Schools*, HARFORD COUNTY EDUCATION HEADLINES EXAMINER (February 14, 2010), available at <http://www.examiner.com/x-17574-Harford-County-Education-Headlines-Examiner~y2010m2d14-New-Digital-Dating-Abuse-curriculum-being-released-on-Capitol-Hill>.

Similarly, in recognition of “National Teen Dating Violence Awareness and Prevention Month,” the California Legislature noted that “sexting,” is “becoming [a] new frontier[] for teen dating abuse.” Assem. Con. Res. 100, 2009-10, Reg. Sess. (Cal. 2010), available at http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0051-0100/acr_100_bill_20100104_introduced.pdf.

⁶⁷ The National Campaign survey reported that 15% of the teens engaged in this behavior have sent such images to people they only knew online, and the MTV Survey reported 29% of those who have sent “sexts” did so to people they only knew online and have never met in person. National Campaign, *supra* note 42,

social problem is that these images are frequently forwarded past the intended recipient. The disseminator is not only the subject of the image. Twenty-five percent of teen girls and 33% of teen boys report having had nude or semi-nude images originally meant for someone else shared with them.⁶⁸ The MTV survey found 17% of recipients report they have forwarded such images and more than half of those forwarded them to more than one person, with boys more likely to receive such forwarded images.⁶⁹ The MTV Survey reports the motivations for this include the assumption that others wish to see them, desire to show off, and boredom.⁷⁰ The Cox survey's conclusion that 1 in 5 teens have engaged in "sexting" includes receiving such pictures with 17% reporting receiving such a picture, where only 3% of teens report forwarding a picture.⁷¹

Finally, any public policy must consider youth attitudes towards the dangers of "sexting" and self-produced child pornography. Youth do appear to have some appreciation that the circulation is not without risk. As the Pew Survey notes, "sexting is a topic with a relatively high level of social disapproval."⁷² This notion that teens have some level of recognition of the negative aspects and risks of sending such pictures is an important component of prevention. Teens responding to the National Campaign survey agree with the following descriptors of the activity of sending such pictures: "flirty" (61%) but also "dangerous" (67%) and "stupid" (57%).⁷³ The Cox Survey focused more on the negative consequences that actually occurred. Thirty percent reported they knew of friends whose photographs were forwarded to someone they did not want to see it and 10% knew a friend who was threatened by the recipient of sending it to others.⁷⁴ In a rather interesting insight, 74% of the youth in the Cox Survey agreed that people their age are "too young

at 2; MTV Survey, *supra* note 47, at 2, MTV-AP Poll, *supra* note 47, at 17. Eleven percent of the youth "sext" senders in the Cox Study sent messages with nude or semi-nude pictures to people they did not know. Cox Survey, *supra* note 46, at 36.

⁶⁸ National Campaign, *supra* note 42, at 3.

⁶⁹ MTV Survey, *supra* note 47, at 3.

⁷⁰ *Id.* at 3; MTV-AP Poll, *supra* note 47, at 16.

⁷¹ Cox Survey, *supra* note 46, at 34. While initially this 3% figure seems in contrast with the earlier figures, it may not be. Other surveys report percentages of those who are engaged in "sexting," while this 3% figure is of all teens surveyed. MTV Survey, *supra* note 47, at 3 (examining percentage of all "sext" recipients forwarding images).

⁷² Pew Study, *supra* note 48, at 4 n.10.

⁷³ National Campaign, *supra* note 42, at 10. They further agree with the description of those who engaged in this activity as "slutty" (72%), desperate (65%), flirty (65%), insecure (55%), bold (55%), stupid (54%), and immature (53%). *Id.*

⁷⁴ Cox Survey, *supra* note 46, at 38.

to be sending nude or nearly nude/sexually suggestive photos of each other” yet 52% agreed they are old enough to decide for themselves.⁷⁵ Notwithstanding that arguable inconsistency, 90% of youth agree in the Cox Survey that “it is dangerous to send nude or nearly nude/sexually suggestive photos of yourself.”⁷⁶ The most recent survey by the Pew Center notes that in their focus groups the “teens’ attitudes toward ‘sexting’ vary wildly, from those who do not think it is a major issue to others who think it is inappropriate ‘slutty,’ potentially damaging or illegal.”⁷⁷ Regarding consequences, in the National Campaign survey, 83% of youths reported that they are concerned about sending such images or messages because they would regret it later.⁷⁸ Only 46% felt that a reason to be concerned was because they could get in trouble with the law.⁷⁹ Interestingly, in the Cox survey 74% of youth surveyed thought “sexting with photos of someone under 18 is wrong” and 48% felt it should be illegal.⁸⁰ While 90% thought this behavior was dangerous, only 55% knew that there were legal consequences to this behavior.⁸¹

Whether 4% or 20% of youth are sending some form of provocative text or image, all can agree it is a measurable amount and some portion of those are visual images. Of those images, a smaller portion meets state or federal definitions of child pornography. Those images are sent under a wide array of circumstances. While associated with the dating ritual, a measureable amount of those images are sent under pressure from others. Similarly, it would appear that a significant segment of the distribution is subsequent to the original distribution. With this understanding of the issue, albeit based on surveys and not peer-reviewed studies, let us turn to some aspects of the national dialog.

IV. HOW THE ISSUE IS MISUNDERSTOOD: THE SENSATIONALISM OF THE DEBATE

A. OVERGENERALIZATION

Often debates are pulled off track because the problem one side is seeking to solve is a different problem than that which the other side is

⁷⁵ *Id.* at 42.

⁷⁶ *Id.* at 43.

⁷⁷ Pew Survey, *supra* note 48, at 8.

⁷⁸ National Campaign, *supra* note 42, at 14. There were several other reasons reported for concern including potential embarrassment (77%), possible damage to reputation (74%), and family disappointment (68%). *Id.*

⁷⁹ *Id.* at 14.

⁸⁰ Cox Survey, *supra* note 46, at 40. Of the remaining youth, only 3% found nothing wrong with this behavior, as 23% found it to be fine behavior, but only if the people sending and receiving “think it is OK.” *Id.*

⁸¹ *Id.* at 43.

addressing. Similarly, at times the complicated nature of a problem is oversimplified. Such oversimplification distorts both the debate and ultimately the solutions offered. Both of these occurred in the national discussion regarding self-produced child pornography. The debate was distorted by overgeneralizing the problem and treating diverse behaviors as equivalent. The solution of structured prosecutorial discretion allowing non-mandatory juvenile adjudication to remain on the table was distorted by characterizing it as advocating for juvenile adjudication.⁸² These are indeed two very different solutions.

B. STRUCTURING THE PROBLEM

1. Factually Distinguishing the Problem

The media's use of the term "sexting" over-generalizes and places under one heading diverse behaviors.⁸³ The actual problem of self-produced child pornography must be made clear. There are many associated behaviors which cause very different harms and in and of themselves and can occur under very different circumstances. NCMEC

⁸² As will be discussed, *infra*, the sensationalized debate incorrectly labels this as advocating prosecution. For example, in response to the original article, Professor Stephen F. Smith labeled the proposal as a new and exclusive prosecutorial solution to the entire problem of self-produced child pornography. Stephen F. Smith, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA J. SOC. POL'Y & L. 505 (2008). *See id.* at 505 ("Professor Mary Graw Leary advocates a new role for the criminal law to play in the effort to eradicate child pornography."); *Id.* at 506 ("Professor Leary advocates . . . prosecuting the minors who create and distribute it."); *Id.* at 507 (labeling the article as a "prosecution-based response"); *Id.* at 531 ("Professor Leary advocates prosecution."). Professor Smith's article is a welcome and thought-provoking addition to the debate and, as will be discussed throughout this article, we share a commitment to both the appropriate use of the law and child protection. However, Professor Smith's article misunderstands structured prosecutorial discretion as a new aggressive proposal as opposed to a component of a multidisciplinary approach which allows prosecutorial options to remain available.

⁸³ *See supra* notes 16-25 and accompanying text. An excellent example of this overgeneralization is the recent press coverage of pending Supreme Court case, *City of Ontario v. Quon*, 529 F.3d 892 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3619 (U.S. Dec. 14, 2009) (No. 08-1332). Much of the media labeled this case a "sexting case" although it involves, *inter alia*, whether a governmental employee has a reasonable expectation of privacy in text messages sent between adults without images on a government-issued device. *See, e.g.*, Andy Lagomarsino, *U.S. Supreme Court Justices Step into Uncharted Waters with 'Sexting' Cyber-liability Case*, NEW JERSEY NEWSROOM, Jan. 6, 2010, available at <http://www.newjerseynewsroom.com/nation/us-supreme-court-justices-step-into-uncharted-waters-with-sexting-cyber-liability-case>; *No Sexting on the Job*, CHI. TRIB., Jan. 5, 2010.

artfully highlights in its Policy Statement on “Sexting,” that there are potentially several actors in a self-produced child pornography event: the person who produces the image, the person who disseminates the image, the person who receives the image, and the person who further disseminates it.⁸⁴ Moreover, multiple roles can be played by the same person.⁸⁵

It must be emphasized at the outset that the specific behavior to be addressed is when a minor produces or distributes an image of himself or others without the involvement of an adult.⁸⁶ Whenever there is an adult involved in production, even in simply requesting the image, this is not an example of self-produced child pornography. This is an example of grooming the child for sexual exploitation at a minimum or coercion and other crimes such as online solicitation or luring.⁸⁷ The child should be considered only a victim.⁸⁸ That being said, there is a great deal of varied behavior still to be addressed, such as the naïve production by an individual, distribution to one other, mass vindictive distribution, surreptitious filming, or distribution without knowledge. The original article sought to aid prosecutors’ offices in wading through the different factual scenarios, not just that of the initial sender.

Others look at a much narrower question, often focusing solely on the simplest of scenarios when a juvenile takes a picture of him or herself alone and sends it to one other person.⁸⁹ By limiting the question in this way, one limits the analysis to the easier question.

The difficulty occurs in the more complicated scenarios. Such as the juvenile who takes a picture of himself or herself and another juvenile who may or may not know of the picture or its distribution; the perhaps

⁸⁴ The National Center for Missing & Exploited Children, *Policy Statement on Sexting*, Sept. 21, 2009, available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

⁸⁵ *Id.*

⁸⁶ Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 4 n.8 (2007).

⁸⁷ *Id.* at 36 n.154.

⁸⁸ *Id.* at 4 n.8 (“In that scenario the child is completely a victim and has been exploited by the adult.”).

⁸⁹ Smith, *supra* note 82, at 514; (“[t]herefore the questions Professor Leary raises are largely directed to the discretion of prosecutors: whether, despite the applicability of child pornography offenses, minors who produce pornographic images of themselves should be prosecuted.”); *Id.* at 544 (“We deal here with minors (typically, older teenagers) who freely choose, on their own, to make or distribute sexually explicit images of themselves.”). John Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONST. L.Q., 433, 433-34, 436 (2010) (providing examples of “...the burgeoning phenomenon of teenagers taking sexually explicit pictures of themselves and sending them to friends...”).

more common situation when the initial intended recipient then distributes the images without the original sender's knowledge; or the juvenile who pressures the other to produce the image. Many either do not answer these questions or would treat all these juveniles the same.⁹⁰ Yet these are questions current statistics tell us must be answered. This is where the oversimplification becomes problematic. Critics of structured prosecutorial discretion assume the youth is only the youth who takes a picture of himself or herself and sends it to one person. The distinction between him and an adult predator is obvious and we all share the concern that such individuals should not be equated. However, the comparative distinction breaks down in some of the other documented cases of pictures sold by other youths, or forwarding of images received, or boyfriends who pressure girlfriends to pose for such pictures.⁹¹ These scenarios add components of victimization to some of the juvenile actors. It is tempting to ignore this, but that does not solve the problem.⁹² In my view these questions must be answered and such behaviors are very different and cannot be categorized together.⁹³ Prosecutors need to decide when, if ever, they will prosecute in juvenile court using objective criteria which distinguishes among different criminal scenarios.

⁹⁰ Consider the two examples Professor Smith equates. The first group describes one person sending a picture to one other person or two girls taking non-pornographic pictures and distributing them. The second example includes a case of recording two youths having sex, where it is "unclear if the girl made the video herself or, if not, knew she was being filmed." Smith, *supra* note 82, at 509 n.13. These are very distinct situations and, as for the latter, it should matter a great deal to a prosecutor whether the person whose image is later distributed throughout the internet knew she was being filmed. Structured prosecutorial discretion considers the distinctions among all these scenarios. A blanket "no prosecution" policy does not.

⁹¹ See *supra* notes 16-25 and accompanying text.

⁹² An example of this is when Professor Smith compares two masochistic videos, one is created by a fourteen-year-old girl and one is done by the same girl after enticement by a middle-aged man. He suggests that under these proposed guidelines they would be treated the same. Yet, such would not occur under structured prosecutorial discretion; where the girl would likely not be prosecuted at all. First, self-produced child pornography only involves scenarios where no adult is involved. Leary, *supra* note 86, at 4 n.8. Second, under this structured approach the juvenile would not be considered adjudicable because factors clearly disfavor it.

⁹³ See W. Jesse Weins & Todd Hiestand, *Sexting Statutes and Saved By the Bell: Introducing a Lesser Juvenile Charge with an "Aggravating Factors Framework,"* 77 TENN. L. REV. 1, 52 (2009) (arguing for the recognition that not all "sexting" is the same and lower level activity warrants less severe punishments than more severe activity).

2. Legally Distinguishing the Problem

As stated, at issue is whether prosecution in juvenile court should *remain* on the table or the crime of self-produced child pornography should be decriminalized. The use of the word “remain” is important. The article never proposed newly-criminalizing this currently legal behavior. Rather, it addressed the situation that currently existed: this behavior was already illegal as it falls within child pornography production, distribution, and possession laws.⁹⁴ Other questions arise. For example, many argue these pictures should not be considered child pornography because the purpose of dismantling child pornography as outlined in *New York v. Ferber*, never contemplated self-produced child pornography.⁹⁵ This issue is distinct from the more relevant question, which is not whether *Ferber* contemplates the factual scenario of self-produced child pornography, but whether the justifications for *Ferber*’s holding are implicated by self-produced child pornography.⁹⁶ As will be discussed *infra*, the justifications are implicated. The remaining question of whether it is solid policy to do so is distinct, albeit an important one.⁹⁷

⁹⁴ Leary, *supra* note 86, at 19, Smith, *supra* note 82, at 512. Humbach, *supra* note 89, at 438-39 (conceding “sexting” falls under the broad categorical exclusion of child pornography but arguing it should not); Weins, *supra* note 93, at 16 (“First Amendment protection is not afforded to sexting that amounts to child pornography...”).

⁹⁵ E.g. Don Corbett, *Let’s Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of Sexting*, 13(6) J. OF INTERNET L. 3 (2009) (stating that purveyors of child pornography and “sexting teens bear little resemblance”). See generally *New York v. Ferber*, 458 U.S. 747 (1982).

⁹⁶ Indeed, *Ferber* may not have contemplated the factual scenarios of much of modern child pornography trading: i.e. peer-to-peer sharing, Internet traded homemade non-commercial production, the possession via the Internet as opposed to magazine images. Yet, those are not excluded from child pornography regulation. They are included because the justifications and concerns in *Ferber* apply to them. See e.g., *United States v. Williams*, 128 S. Ct. 1830, 1840 (2008) (“[I]n many cases distribution is carried out by individual amateurs who seek no financial reward”). *Ferber*, 458 U.S. at 753; *United States v. Holston*, 343 F.3d 83 (2d Cir. 2003) (“within the unique realities of the child pornography market, much of the production and trafficking was non-commercial”).

⁹⁷ See *infra* Part V; this article’s conclusion that it should remain on the table should not be mistaken for (a) a claim that juvenile prosecution is the solution to the problem of self-produced child pornography or (b) a position advocating for punishment or jail for juveniles who do so. Notwithstanding the explicit language of the original article, the suggestion that the original article proposed this is mistaken.

C. CONCEPTUALIZING THE SOLUTION

1. *Confusing a Rejection of Decriminalization with an Advocacy for Punishment*

One can oppose decriminalization for many reasons. Presumably one could do so out of a desire to *punish* the offenders. However, structured prosecutorial discretion is not motivated by a desire to punish, although some label it as such.⁹⁸

Structured prosecutorial discretion explicitly suggests *considering* prosecution in juvenile court (also known as adjudication). Central to the thesis is that the rehabilitative climate of juvenile court before a juvenile turns eighteen is the time to act, i.e. when society is compelled to help these youth.⁹⁹ While state intervention into the life of a juvenile is never

⁹⁸ Smith, *supra* note 82, at 529-30; Humbach, *supra* note 89, at 437 n.26 (describing the article as suggesting “the prosecution of sexting teenagers is a good thing”); *contra* Weins, *supra* note 93, at 3. For example, Professor Smith inadvertently sensationalizes the discussion, suggesting that the original 2007 article sought to punish these juveniles. It is flattering that Professor Smith considers my article noteworthy enough to merit a response. Unfortunately, he mischaracterizes the article when he repeats that it “advocate[s] prosecution” of children who engage in SPCP. While the words “prison,” “imprisoned,” “incarcerate,” and “incarceration” are used, these are only within footnotes directly quoting from statutes and reports. Leary, *supra* note 86, at 3 n.3, 33 n.141, 43 n.183, 3 n.3, 29 n.130, 30 n.134. Indeed, the word “punish” is used in the original text only twice, and in both instances it is used in the context of distinguishing the juvenile rehabilitative system from a criminal punishment system. *Id.* at 30-31 (“Thankfully, in many jurisdictions, the criminal justice system shares this recognition and offers minors alternatives to punishment”); *Id.* at 43 (“Unlike the criminal system, the juvenile system is intended to rehabilitate, not punish, the child”). The words “punished” and “punishment” are used nine times in footnotes, but these are all quotes from other statutes or titles of sources. *Id.* at 29 n.130, 33 n.141, 35, 36 nn.152-53, 43 nn.182-83. Notwithstanding this, Professor Smith entitled his response to this article, which does not once use the word “jail,” as “Jail for Juvenile Pornographers? A Response to Professor Leary.” Similarly, in Pennsylvania, a representative proposed a “sexting” statute with the goal of reducing the penalties “sexting” teens face under child pornography statute from a felony to a misdemeanor. Yet the ACLU opposed the legislation as an effort to criminalize already protected activities. See Tom Joyce, *ACLU Objects to Sexting Bill*, DAILY RECORD, Feb. 6, 2010; Jeffrey Boyles, *Sexting Bill Strikes Fair Balance*, DAILY RECORD, Feb. 12, 2010. See also, Carol Louis, *Sexting Spawns New Witch Hunt*, DAILY NEWS, Apr. 23, 2009 (labels charging juveniles as a “witch hunt”).

⁹⁹ Leary, *supra* note 86, at 43; Weins, *supra* note 93, at 28 (describing the approach as allowing prosecution to remain an option). Concededly, one can overstate the rehabilitative qualities of juvenile court which has grown increasingly similar to criminal court since its origins. Therefore, when

preferred, it can be an opportunity, at times the only opportunity, to assist a youth in a rehabilitative setting. Therefore, the placement of any adjudication solely in the rehabilitative setting of juvenile court rejects punishment as a motive for adjudication.¹⁰⁰

Furthermore, the cost of failing to take this action when necessary must be recognized. While no one desires objectively any state intervention into private lives, one must recognize the alternatives can be far worse. One must ask the same question posed in the article, but unanswered by those who seek decriminalization: “should not the state, given its duty to protect its citizens intervene when it has the opportunity?”¹⁰¹ For some the answer is, “no.” Such a position can be taken, but not without costs. One of the costs is that if the juvenile engages in the behavior of possessing and distributing such pictures of minors (or sending his or her own obscene picture to a minor) as an adult, he or she could then be charged with a crime finding himself or herself in the punitive adult criminal justice system.¹⁰² Some may be comfortable with knowing that the state had an opportunity to stop the person when he was a juvenile, but chose not to do so. However, that position begs the question, of whether society fulfilled its duty to help

supporting juvenile court jurisdiction, one must ensure that the rehabilitative features of the juvenile system apply. Such was done in Vermont when that statute explicitly provided for such procedures including no sex offender registration and expunged records. VT. STAT. ANN. tit. 13, § 2802b (2010).

¹⁰⁰ Leary, *supra* note 86, at 50 (the conclusion section for the article repeats this by stating “rehabilitation under the juvenile court model”). The paper could not be clearer as to advocating for only a juvenile court model. It discusses the doctrinal basis to intervene, specifically arguing that the basis of the underlying doctrines of juvenile court allow for such an intervention. *Id.* at 26-28; *Id.* at 42 (referencing the Supreme Court’s statement that “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *Ferber*, 458 U.S. at 757); *Id.*

¹⁰¹ Leary, *supra* note 86, at 44.

¹⁰² Indeed such has occurred. The Iowa Supreme Court has affirmed the conviction of eighteen-year-old Jorge Canal for knowingly disseminating obscene material to a minor. *State v. Canal*, 773 N.W. 2d 528 (Iowa 2009) (eighteen-year-old defendant sent fourteen-year-old co-student a picture of his erect penis upon recipient’s request). Similarly, eighteen-year-old Phillip Alpert distributed a naked picture of his sixteen-year-old girlfriend to dozens of people “because I was upset and tired and it was the middle of the night.” Deborah Frederick and Sheila Steffen, CNN American Morning (April 18, 2009). He was convicted of distributing child pornography and because he was eighteen, placed on the sex offender registry. *See also* Kyle Alspach, *Accused Brockton High “sexting” Student Pleads Not Guilty, Released Without Bail*, GATEHOUSE NEWS SERVICE, Jan. 13, 2010 (Eighteen-year-old charged with dissemination of obscene matter harmful to minor for allegedly distributing his video depicting oral sex being performed on a male.); Leary, *supra* note 86, at 44.

this juvenile by looking the other way when he was a minor and could have helped him with very little cost to him?¹⁰³ It would seem not.

The concern that prosecution could mean juveniles will face consequences more damaging than their actions deserve, artfully made by Professor Smith and others, is a legitimate and important concern that any solution must address. Structured prosecutorial discretion does address this. These factors are critical to both proportionality and consistency. The existence of the factors proposed in the protocol can guide prosecutors to objective use of discretion.¹⁰⁴ The first significance of the factors goes to the concern about the costs of prosecution. Professor Smith's laudable goal is that prosecution should consider whether the grade offense and offense level fit the actual crime charged. His proposal and structured prosecutorial discretion agree upon this point. That is why one category of factors to consider is labeled "crime specific factors."¹⁰⁵ In considering the factors, a case in which just the producer was in the images, for example, would be treated very differently than the film of a sexual assault or of a sexual encounter with a minor unaware of the filming. Similarly, a person engaged in this as a business or for blackmail of minors would be treated very differently than someone doing this activity for attention. Therefore, consideration

¹⁰³ The original article discusses at length the *parens patriae* duty of the court to intervene in the lives of juveniles. *Id.* at 26-28. In denying a mistake of age defense to child pornography, the Court of Appeals for the Eighth Circuit states: "the state may legitimately protect children from self destructive decisions reflecting youthful poor judgment that makes them in the eyes of the law 'beneath the age of consent....The state's interest in discouraging minors from posing as adults by eliminating the mistake of age defense is entitled to great weight.'" *Gilmour v. Rogerson*, 117 F.3d 368, 372 (1997); *Boyles*, *supra* note 98 ("Sometimes we must act to protect our children, in spite of our children. They may believe that they can live a good life without schooling, or drink or smoke before they are old enough....they may think [sexting] completely innocent, and a natural outlet for their sexual exploration, sexting is not. We must protect them from victimizing themselves.").

¹⁰⁴ This protocol includes consideration of offender based factors and offense specific factors. *Leary*, *supra* note 86 at 49; *Weins*, *supra* note 93, at 48 (describing the prosecution protocol).

¹⁰⁵ *Leary*, *supra* note 86, at 49. In arguing against even the possibility of prosecuting such children in juvenile court, Professor Smith and others stress that prosecutors sometimes misuse their discretion by prosecuting self-produced child pornography cases in adult criminal court that can damage the juveniles' lives more than the images do. Regrettably, that can sometimes be true and must be avoided. However, occurrences of such cases go more to prove than disprove the point of structured prosecutorial discretion. If prosecutors develop protocols before such cases arrive, there is a far greater likelihood that the decisions governing each case will reflect the comparative culpability of the conduct and the damage the conduct is likely to do to the child him or herself, to other children, and to society at large.

of the actual facts as they relate to a resulting adjudication are demanded to avoid too strong a sanction.

Additionally, proportionality is urged to be considered in light of the decreased moral culpability of minors and that their behavior is distinct from the pedophile or adult sexual predator of children.¹⁰⁶ Professor Smith and others quite rightly note that the child pornography laws and their accompanying stigma and penalties may not have contemplated punishment for such youth, but rather adult sexual offenders. This is true and an important addition to the national discussion. However, the answer of eliminating adjudication in all cases is an inadequate response.¹⁰⁷ The structured prosecutorial discretion model goes further than just eliminating prosecution. It examines both the crime specific factors as well as the offender specific factors. In so doing, the proposed system treats the juvenile who is unamenable to treatment who has filmed an extreme sexual act with another and disseminated it widely very differently than the juvenile amenable to rehabilitation. This is assessing the proportionality of the outcome¹⁰⁸ just by a different less blunt path than decriminalization.¹⁰⁹

¹⁰⁶ E.g., Smith, *supra* note 82, at 530.

¹⁰⁷ Professor Smith argues, *inter alia*, for leaving the laws on the books, but threatening to enforce and sometimes perhaps enforcing them against juveniles as a last resort. *Id.* at 542.

¹⁰⁸ One could explicitly add another factor to the protocol regarding the potential stigma associated with a delinquency finding in such a case. This is unnecessary, however, because prosecutors should always consider the stigma of prosecution as part of their prosecutorial discretion calculus. Today, avoiding the stigma from being convicted of sex crimes is more important than ever and various jurisdictions are creating lesser crimes for this behavior. See *infra* Part V. As discussed below, this movement to distinguish this behavior from so called “conventional child pornography,” while not entirely decriminalizing it, is a positive development. In such a regime with various potential crimes, it becomes even more important to consider the stigma factor so as to charge the juvenile appropriately.

¹⁰⁹ It is in Professor Smith’s criticism of the juvenile court model that adds to the sensationalism. First, it is suggested that structured prosecutorial discretion in juvenile court is too harsh. He offers two examples of child exploitation – one groomed by an adult and one self-produced – and argues that both would result in a sentence of fifteen years. The former example would not be prosecuted because child exploitation facilitated by an adult is excluded from self-produced child pornography. Moreover, the latter juvenile would likely never be prosecuted at all because the factors rule it out. If a juvenile were to have some other factors present, he may be prosecuted in juvenile court. Second, Professor Smith then reverses his criticism and argues the juvenile court forum is without merit because it is one with little deterrent value. Smith, *supra* note 82, at 532-33. While juvenile court is not a criminal forum, it still serves some deterrent value. Certainly there are some juveniles who want to avoid adjudication. If that were not the case, the numbers of juvenile offenders in all areas of crime would be exponentially greater than they are now. There may be specific deterrence as

The second concern is consistency. These factors lead to a consistent and well-considered approach. In 2007, only a few cases of prosecution were actually reported. Anecdotally it did indeed appear that there was little guidance on what cases merited prosecution and what did not. Children deserve better. If society is going to intervene in the lives of a juveniles because of destructive behavior, or choose not do so, children deserve to have that policy decision not be made on an ad hoc basis. They deserved to have prosecutors' offices think through systematically what types of cases would be prosecuted and what would not. Structured prosecutorial discretion does so.

2. *The Misunderstanding of Juvenile Court*

When discussing the possibility of adjudicating juveniles in juvenile court, especially for behavior which is harmful to them, people grow concerned. This concern is positive. Bringing any juvenile into any court should not be handled lightly and should be approached with concern that society is doing so in an effort to assist the child or victims.

However, the alarm should not be sounded before understanding the limits of proposed interventions. Some oppose adjudication even when juvenile court is offered as the exclusive forum and fuel that argument with the claim that such will expose juveniles to severe punishment.¹¹⁰

well. If one has a self-destructive juvenile who refuses voluntary counseling or intervention, the juvenile court may be a path to mandate that intervention and help the child. Regarding deterrence, the alternative proposal, as discussed, *infra*, is simply to "threaten" prosecution and see if that deters people. That cannot be more effective than actually utilizing the statute. If actually prosecuting the rare case in juvenile court has no deterrence value, it is difficult to imagine how threatening to do so, but never intending to do so will deter youth.

¹¹⁰ For example, Professor Christopher J. Ferguson criticized a proposal in Indiana to draft a new crime to encompass this activity as criminalizing socially normative behavior and harming children. This caused legislator James Merritt to respond by explaining that current Indiana law applicable to this behavior were felony child pornography offenses which he felt were too harsh. Merritt proposed a new statute that would limit juveniles' exposure to punishment, but at the same time contribute to ending the behaviors. James Merritt, Letter to the Editor, *Sexting and the Law: Lessons for Youth*, INDIANAPOLIS STAR, Jan. 15, 2010, at A15, available at 2010 WLNR 978175 ("[The] intention is to carve out a new, less punitive status offense of sexting in which the offender can be taught the seriousness of the offense and be held accountable in a manner . . . [and] also to save these teens from felony records and jail, and . . . keep them off the sex offender registry. . . . An informal adjustment means the Juvenile Court may require the teen to participate in an educational initiative or any other appropriate program or service, rather than face prosecution. No jail time, no sex offender registry, just a stern warning to the teenage offender.").

Most commentators, however, agree that juvenile court is the proper forum.¹¹¹ Opponents focus on two arenas where this emotionally-driven reaction is misplaced: sex offender registration and mandatory sentences. These concerns are misplaced under the structured prosecutorial discretion paradigm proposed.

a. Sex Offender Registration

To be clear, structured prosecutorial discretion does not support juvenile sex offender registration for either sexting or self-produced child pornography cases.¹¹² Notwithstanding this unequivocal statement, many automatically assume governmental response means a child must register as a sex offender.¹¹³ For the juvenile of concern to many, this is not necessarily the case. Where it is the case, legislators are free to and indeed should exempt juveniles from such a requirement.¹¹⁴

Part of what fuels this fear is a change in federal law. The Sex Offender Registration and Notification Act (SORNA) redefined “conviction[s]” that trigger registration to include certain juvenile

¹¹¹ Weins, *supra* note 93, at 52.

¹¹² Leary, *supra* note 86, at 46, 48; Weins, *supra* note 93, at 53 (recognizing Leary’s position). The Leary article discusses sex offender registration not to advocate the use of registration, but because sex offender registration is an obvious aspect of punishing sexting or self-produced child pornography that merits review. The article unequivocally states that for the juvenile of concern to Professor Smith, the youth who sends a picture of himself to one other person, should never be the subject of sex offender registration. *Id.*

¹¹³ For example, Professor Smith, after acknowledging this opposition to sex offender registration, criticized this limited prosecutorial discretion as flawed due to sex offender registration as “not some remote possibility that might (or might not) come to pass when minors are convicted of making or circulating pornographic images of themselves. It is, absent legislative reform, an unavoidable fact.” Smith, *supra* note 82, at 536. Similarly, Professor Humbach asserts that “millions of American teenagers are felony sex offenders.” Humbach, *supra* note 89, at 437. This reflects a misunderstanding on several levels. First, it assumes all sexually explicit “sexting” images are child pornography. *Id.* at 3-4, 5 (“The broad categorical exclusion established for child pornography in 1982 seems in its verbal formulation at least to easily include teen sexting and other auto pornography.”). As discussed in Part I *supra*, they are not always illegal child pornography. Secondly, it misconstrues the Sex Offender Registration and Notification Act. *Id.* at 4 n.26. *See also*, Brief of Juvenile Law Center as Amici Curiae Supporting Appellees at 27-28, *Miller v. Skumanick*, No. 09-2144 (Sept. 25, 2009) (arguing against juvenile adjudication because of sex offender registration, but acknowledging that current Pennsylvania law would not require registration in Pennsylvania).

¹¹⁴ Vermont did so in its new legislation regarding self-produced child pornography. VT. STAT. ANN. tit. 13, § 2802b(b)(2) (2010) (exempting minors adjudicated under this section from sex offender registration).

adjudications.¹¹⁵ Some conclude from this that all juveniles who create self-produced child pornography are then unavoidably placed on the sex offender registry.¹¹⁶ Importantly, however, SORNA limits what can expose juveniles to possible registration requirements.

The term “convicted” or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a **juvenile** for that offense, *but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse* (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.¹¹⁷

Therefore, a juvenile facing sex offender registration under federal law must be at least fourteen years of age and must have been adjudicated of an offense which at least involves the conduct of Aggravated Sexual Abuse.¹¹⁸ The Final Guidelines for Sex Offender Registration and Notification appear to confirm this. “[I]t is sufficient for substantial implementation of this aspect of SORNA to require registration for (roughly speaking) juveniles at least 14 who are adjudicated delinquent for offenses equivalent to rape or attempted rape, but not for those

¹¹⁵ The Sex Offender Registration and Notification Act (SORNA) expanded the definition of “offense against a minor” to include possession, production, and dissemination of child pornography. Smith, *supra* note 82, at 536; 42 U.S.C. § 16911(7)(g) (2006); Leary, *supra* note 86, at 45-46 (describing the Adam Walsh Child Protection and Safety Act of 2006 which contains the Sex Offender Registration and Notification Act).

¹¹⁶ Smith, *supra* note 82, at 536; Humbach, *supra* note 89, at 437 n.26.

¹¹⁷ 42 U.S.C. § 16911(8) (2006) (emphasis added).

¹¹⁸ “Aggravated Sexual Abuse” involves causing another to engage in a sexual act by force; threat of death, serious bodily injury, or kidnapping; rendering them unconscious or administering an intoxicant which impairs the person prior to the sexual act; or crossing state lines to engage in a “sexual act” with a child under twelve years old; or engaging in a sexual act by force or threat or other means (as defined by statute) with a person under sixteen and four years younger than themselves. 18 U.S.C. § 2241 (2000 & Supp. 2009); 73 Fed. Reg. 38,050 (July 2, 2008). “Sexual Act” is defined under federal law as “(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2) (2006).

adjudicated delinquent for lesser sexual assaults or non-violent sexual conduct.”¹¹⁹ The regulation regarding SORNA explicitly states that “SORNA does not require registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes (or attempts or conspiracies to commit such crimes).”¹²⁰

Obviously, sex offender registration is not only a federal matter. SORNA was designed to express the minimum requirements for sex offender registries, and create some uniformity throughout the nation.¹²¹ Therefore, some states may require sex offender registration in additional circumstances.¹²² However, the question then becomes not simply whether a state allows juvenile sex offender registration, but whether it does so for child pornography adjudications. According to the National Center for Juvenile Justice, not all states apply sex offender registration to juveniles.¹²³ Thirty-nine states permit¹²⁴ or require¹²⁵ adjudicated juveniles to register as sex offenders for certain crimes¹²⁶ and other states forbid it.¹²⁷

¹¹⁹ 73 Fed. Reg. 38,030 (July 2, 2008).

¹²⁰ *Id.* at 38,050. Of course, if a juvenile rapes by force or rapes an eleven-year-old without force, films it, he then could be placed on a sex offender registry under SORNA. However, it would not be for the filming, but rather for the underlying sexual act.

¹²¹ *Id.* (“As with other aspects of SORNA, the foregoing defined minimum standards... SORNA do[es] not constrain jurisdictions from requiring registration by additional individuals, e.g. more broadly defined categories of juveniles adjudicated delinquent for sex offenses- if they are so inclined.”).

¹²² Professor Smith claims that “most states already required juveniles convicted of sex crimes to register as sex offenders.” Smith, *supra* note 82, at 536. That is simply not the relevant question. The question is whether juveniles adjudicated in juvenile court of possessing or producing child pornography or now other offenses triggered by SPCP would be required to register.

¹²³ Linda Szymanski, Megan’s Law: Juvenile Sex Offender Registration (2009 Update), (2009).

¹²⁴ Some do not require it, but it is an option for a court after extensive evaluation. *E.g.* Arkansas, ARK. CODE ANN. §9-27-356(a)-(i) (2009); Kentucky, KY. REV. STAT. ANN. § 635.10(3) (2008); Rhode Island, R.I. GEN. LAWS § 11-37.1-4(j) (West Supp. 2002); North Carolina, N.C. GEN. STAT. §14-208.26(a) (2001).

¹²⁵ *E.g.* New Jersey, N.J. STAT. ANN. §2C:7-2(a)(1) (2005 & Supp. 2009); Massachusetts, MASS. GEN. LAWS ch. 6, §§ 178C, 178D (1998); Florida, FLA. STAT. ANN. § 943.0435(11) (2006 & Supp. 2010); Iowa, IOWA ADMIN. CODE R. 441.103.33 (692A) (2010); Missouri, MO. ANN. STAT. § 211.425 (2004 & Supp. 2010).

¹²⁶ Szymanski, *supra* note 123.

¹²⁷ *E.g.* Georgia, GA. CODE ANN. §42-1-12 (1997 & Supp. 2009).

Therefore, the risk of sex offender registration is nonexistent if one accepts structured prosecutorial discretion as a whole for several reasons. First, the structured prosecutorial discretion model excludes sex offender registration because it is inappropriate. Second, federal law does not seem to require it.¹²⁸ Third, structured prosecutorial discretion is part of a multidisciplinary approach. Therefore, if a state includes child pornography adjudication as a registerable offense, the legislature should amend those provisions, thus eliminating sex offender registration before adjudication could be considered by the prosecutor.¹²⁹ It agrees explicitly that if the juvenile is only the producer of self-produced child pornography in its simplest form, he or she should not be prosecuted if it will lead to sex offender registration. Moreover, in applying the protocol suggested, both the offender specific factors as well as the crime specific factors would likely eliminate adjudication in these cases as well.¹³⁰

b. Mandatory Minimum Sentences

Some express concern about mandatory minimum sentences that accompany some criminal court convictions.¹³¹ Structured prosecutorial discretion has always limited any prosecutorial consideration to juvenile court thus usually avoiding this concern because this forum shields juveniles from criminal court and mandatory minimum sentences. In any jurisdiction that fails to do so, legislation should be amended to preclude mandatory minimum sentences. Therefore, this claim that the juvenile forum does not guarantee juveniles an assurance to be prosecuted in juvenile court is misplaced.

As a threshold matter, because juvenile court jurisdiction is rehabilitative with commitment viewed as the 'last resort' and an extreme measure, it is hard to imagine the self-produced child

¹²⁸ Furthermore, as of this writing only a few jurisdictions are in substantial compliance with SORNA: Ohio, the Confederate Tribes of the Umatilla Indian Reservation, and the Confederate Tribes and Bands of the Yakima Nation. Press Release, Department of Justice, *Justice Department Announces First Two Jurisdictions to Implement Sex Offender Notification and Registration Act* (Sept. 23, 2009), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm>; <http://www.ojp.usdoj.gov/smart> (Status of Implementation). Much opposition to any juvenile registration remains.

¹²⁹ Vermont did so in its statute aimed at this behavior. See *infra* note 294.

¹³⁰ In reality if ever in the unimaginable position that prosecution was warranted under the protocol, but may expose the juvenile to sex offender registration, a prosecutor should withdraw charges. However, in her discretion she always could adjudicate the juvenile on a misdemeanor charge which would not trigger registration such as endangering the welfare of a minor or voyeurism as appropriate.

¹³¹ Smith, *supra* note 82, at 515.

pornography case in which a court would consider juvenile commitment.¹³² Juvenile court typically has jurisdiction over juveniles accused of committing delinquent acts when under the age of majority.¹³³ Once a juvenile is adjudicated delinquent, for disposition courts may extend jurisdiction until he reaches a certain age, often the maximum being twenty-one years of age.¹³⁴ The maximum placement, reserved for the most extreme circumstances, would not exceed the jurisdiction of the court.¹³⁵ Were such to occur, the time period for such a placement could only extend to the age of termination of juvenile court jurisdiction.

¹³² SAMUEL DAVIS, RIGHTS OF JUVENILES, 2d Juvenile Justice System (2009) § 2:1, at 466-68 (“commitment of juveniles to juvenile institutions is viewed as the ‘last resort’ and an extreme measure.”).

¹³³ Approximately 38 States (including the District of Columbia) set that age at 18 in most situations. *See, e.g., id.*; 18 U.S.C. § 5031 (2006) (defining juvenile as a person less than 18 years of age, for dispositional purposes, less than 21 years of age); 42 PA. CONS. STAT. ANN. § 6302 (West 2008) (defining a child as an individual under 18 years of age or under 21 years of age for dispositional purposes).

¹³⁴ *See e.g.,* 18 U.S.C. § 5037(c) (2006) (length of juvenile detention for youth under 18 limited until age 21 or five years if over 18); 42 PA. CONS. STAT. ANN. § 6353(a) (initial commitment limited to four years). National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act (UJCA) § 36(e) (“[E]xcept as provided in subsection (a) [for termination of parental rights], when the child reaches 21 years of age all orders affecting him then in force terminate and he is discharged from further obligation or control.”). UJCA § 31 lists available dispositions if child found delinquent as including possibilities under § 30, probation, placement and commitment. Some states allow commitment up to age 21. DAVIS, *supra* note 132, at 456. However § 36(b) of the UJCA states the maximum limit of two years for the duration of a commitment order, allowing for an extension after a hearing and some jurisdictions allow a commitment for remainder of minority. DAVIS, *supra* note 132, at 492.

¹³⁵ *See* DAVIS, *supra* note 132, at 466-68. (Commitment of juveniles even to juvenile institutions is viewed as the “last resort” and an “extreme measure.”). While juveniles transferred to adult court face adult sentences, the original article does not advocate any such transfer and limits adjudication only to juvenile court. In some jurisdictions the decision is given to the prosecutor to decide in which court a case will be presented. *Id.* at 37-44. The proposal demands that the decision rest on juvenile court. Furthermore, juvenile court procedures require courts to implement what is best for the child and the least restrictive alternative. While it is true that that in some jurisdictions the concept of blended sentences exists, this is not relevant because structured prosecutorial discretion rejects any role for adult criminal court. For a definition and discussion of blended sentences, *see* Howard N. Snyder & Melissa Sickmund, Juvenile Offenders and Victims: 2006 National Report 115 (2006). From this discussion of their purposes and utilization, it is clear blended sentences are not a component of proposed structured prosecutorial discretion. Furthermore, only approximately eleven states have such sentences in child pornography cases and none likely would in the new proposed statutes discussed in Part V, *infra*.

Notwithstanding this, if a juvenile in juvenile court were exposed to any such sentence, for structured prosecutorial discretion purposes, any such mandatory sentences, like sex offender registration, should be removed as a possibility.

V. THE FUTURE: ALTERNATIVE PROPOSALS

In 2007 the question before prosecutors was whether to use their authority under child exploitation laws to prosecute juveniles who produce, possess, or distribute self-produced child pornography initially or further down the distribution chain. To that question, the original article offered one systemic-based solution: structured prosecutorial discretion. This solution is grounded in the notions of prosecutorial discretion and diversion in the juvenile justice system. That is to say prosecutors have discretion whether to file or not to file charges, or divert the juvenile to alternative programs.¹³⁶ Since then, there has been a national dialogue on this issue. The landscape has changed in many ways. One important development is the creation of additional laws to address this issue. Prosecutors are now no longer limited to considering just child pornography charges.

A. THRESHOLD ISSUE: WHAT'S THE HARM?

How a society should respond to a social problem depends upon the conceptualization of the social problem, specifically the harm caused. Therefore, how one conceptualizes the harm caused by self-produced child pornography and/or “sexting” will directly affect where one sees the role for courts.¹³⁷

Many agree that self-produced child pornography is not a positive act, citing to numerous personal and professional costs of such pictures

¹³⁶ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, so long as the prosecution has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute...generally rests entirely in his discretion.”).

¹³⁷ The original article outlines the harm of conventional child pornography including the specific harm to children in the images. Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 39-42 (2007). Much of the article discusses that these children are actually harmed, and this must be considered. “The harm the child does herself cannot be minimized. . . . [h]owever, the Supreme Court rather insightfully articulated one harm of child pornography as the creation of a ‘permanent record of [the child’s] participation.’ The use of the word “participation” is significant. That word includes both voluntary and involuntary participation. That a minor lacks the understanding of the destructiveness of his or her actions at the time of the crime does not mean he forfeits the harm he will more tangibly experience when he realizes the permanency of his actions.” *Id.*

circulating on the Internet.¹³⁸ However, others argue it is simply normal sexual exploration¹³⁹ just with a camera, or argue that if the sexual act is legal, it is inconsistent to make a picture of it illegal (such as filming legal, consensual, sexual encounters).¹⁴⁰ The argument highlights a fundamental question in the debate: what is the harm? The aforementioned view assumes the harm, if it exists, is found, not in the pictures but in the underlying act. Therefore, if the underlying act is not illegal, presumably not a sexual assault, it seems they conclude there is no harm caused.¹⁴¹ The original article discusses many of the harms child pornography and self-produced child pornography potentially cause, according to social science research, legislation, and judicial opinions. It

¹³⁸ See, e.g., National Center for Missing & Exploited Children, *Policy Statement on Sexting*, (Sept. 21, 2009), available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130; Christopher Ferguson, *Sexting Teens Don't Fit Into Criminal Category*, INDY STAR, Jan. 9, 2010, <http://www.indy.com/posts/sexting-teens-don-t-fit-into-criminal-category> (“[S]exting carries the risk of embarrassment and bullying.”). Recognition of this harm comes from the most unlikely of sources including a quoted criminal defense attorney who blamed the victim for the pictures from whom his client allegedly coerced them “because there is no way to protect themselves once it takes place and these young girls who are doing that are making a horrific mistake.” *Fourteen Year Old Whitnall Student Blackmailed Underage Girls*, WISN, Jan. 13, 2010, available at <http://www.wisn.com/news/22228269/detail.html>. Similarly, amici on behalf of the ACLU concedes the harm to children when images are circulated. BRIEF OF JUVENILE LAW CENTER, 2009 WL 5538635 at n.9 (“When children who send sext-messages are then later exploited by having their messages and photographs widely disseminated, there is no question they become victims of exploitation.”).

¹³⁹ See Marsha Levick, *Sexting: is it a crime? Proposed PA legislation would make it one*, PENN LIVE, Feb. 7, 2010, available at http://www.pennlive.com/editorials/index.ssf/2010/02/sexting_is_it_a_crime_proposed.html (noting on the one hand children “fail to recognize the risks involved” in “sexting;” then asserting this activity is merely a form of sexual expression.); Timothy Magaw, *Proposals Seek ‘Sensitive Balance’ in Teen Sexting*, DAILY HERALD, Feb. 11, 2010, available at <http://www.dailyherald.com/story/?id=358446&src=109> (quoting legislative counsel for the Pennsylvania ACLU as describing this as the modern equivalent of “being under the bleachers”). As will be discussed *infra*, such a view ignores a fundamental difference between the actions which may be fleeting and the documentation of these actions which lasts perpetually.

¹⁴⁰ See John Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 458, 468, 470-71 (2010); Stephen F. Smith, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA J. SOC. POL’Y & L. 505, 521-22 (2008).

¹⁴¹ See Humbach, *supra* note 140, at 458 (stating “there is *no* resulting harm when teenagers take non-obscene but sexually explicit pictures of themselves (say, a teen at a mirror with a camera phone),” and then arguing “such ‘harm-free’ autpornography would . . . fall outside of the *Ferber* categorical exclusion (and, therefore, be constitutionally protected).”).

divides these into harms to children within the images, to children outside the images and exposed to them, and to society as a whole when it sexually objectifies children.¹⁴² This article will not repeat those arguments but limits the discussion to the more narrow points made in the current debate concerning harm to the children within the images.

Subject youth risk significant harm when they engage in self-produced child pornography either in the initial sending or subsequent transmissions.¹⁴³ Even assuming a situation where the initial act of engaging in sexually explicit conduct (as opposed to its depiction) is possibly legal and a potentially normal aspect of sexual activity, youth still risk harm when it is filmed, documented, and potentially distributed. Child pornography falls into many categories, some more severe in content than others. Child pornography which is the result of a sexual assault must surely be distinguished from that which is not. It does not necessarily follow that pictures of one are harmful and pictures of the other are not. When sexual assault does occur in production, that production is *more harmful* to the subject of the image, as opposed to situations which involve no sexual assault. However, the fact that the image exists out of the subject's control for the remainder of his or her life remains harmful. The harm remains because of the pictures' existence and distribution.¹⁴⁴

¹⁴² Leary, *supra* note 137, at 9-25.

¹⁴³ This discussion should not be interpreted as arguing that harm alone is necessarily sufficient to ban materials from First Amendment protection. The Supreme Court recently rejected a proposed test for categorical exclusion which balanced "the value of the speech against its social costs." *United States v. Stevens*, no. 08-769, slip. op. at 7 (April 20, 2010). See *infra* part V.A.1.d. While harm alone is insufficient, the "regulation of pornographic depictions of children" have considered harm as relevant to the discussion. *Ferber*, 458 U.S. at 756; *Osborne*, 495 U.S. at 111; *Ashcroft*, 535 U.S. at 241, 249-252 (noting virtual images which do not use real children do not harm real children in the production process); *Williams*, 128 S.Ct. at 1846 ("Child pornography harms and debases the most defenseless of our citizens.").

¹⁴⁴ This is consistent with child pornography prosecutions when no assault in production occurs, such as surreptitious recordings. See, *infra*, Part V.A.2. For example, if one were to ask Michael Phelps what was more harmful to him, the alleged smoking of marijuana or the picture of him doing so being distributed across the Internet, likely he would say he was harmed by picture. Similarly, Vanessa Williams, John Edwards, or any other public figure whose nude images are on the Internet may not regret posing nude for someone, or engaging in a sexual act, but are harmed by the existence of pictures of that act. Many have expressed this regret. See Eric Adams, *Blazer's Greg Oden Apologizes Over Nude Sexting Photos*, KTVB, Jan. 27, 2010, <http://www.ktvb.com/news/regiona/1/Blazers-Greg-Oden-apologizes-over-nude-sexting-photos-82802877.html> (quoting Oden describing the incident of self produced images surfacing years later as "very embarrassing and hurtful"); See Jackie Sinnerton, *Childhood*

1. That the Pictures Themselves are Harmful is Consistent with Child Pornography Jurisprudence

Conventional child pornography jurisprudence supports the concept of child pornography images being harmful regardless of whether the subject of the picture is physically assaulted in production or not. In this line of cases the Court has described the harm to real children in two ways: (1) children are harmed when real children are used to create child pornography, and (2) children are harmed when a permanent record of the children's participation is created,¹⁴⁵ the latter harm being exacerbated when the image is circulated.¹⁴⁶ The Court has not limited its conceptualization of that harm to the physical harm suffered in the production of the image. Children do not have to be raped for the images to harm them. Professor Rogers describes the jurisprudence in this area by noting actual harm is inflicted in two ways: harming the victim in its creation and "the injury to the victim by publication of the images."¹⁴⁷ Both the facts and legal analysis of *New York v. Ferber* itself confirm that sexual assaults on children were not the only concern of the Court, but its concern included harm caused by the use of actual children both in production and subsequent dissemination.

a. Ferber's Factual Basis Supports This Concept of Harm

Factually, the very images in *Ferber* question the claim that *Ferber's* exclusive concern was the sexual assault of children or that such was required for material to be considered child pornography. Although the description of the images in *Ferber* is cryptic, the majority opinion described them as films "devoted almost exclusively to depicting young boys masturbating."¹⁴⁸ Such a description could also describe some self-produced images. Yet, the Court remains concerned about the harm of such images to children. Justice O'Connor's concurrence describes the content in a more detailed fashion and references a "twelve year old boy masturbating" while making the following observation:

The compelling interests identified in today's opinion...suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct,

Innocence Caught in a Sinister Web, SUNDAY MAIL, May 24, 2009, available at <http://www.couriermail.com.au/lifestyle/childhood-innocence-caught-in-a-sinister-web/story-e6frer4f-1225715120798> (discussing High School Musical actress expressing "sorrow" and "regret having ever taken these photos").

¹⁴⁵ *New York v. Ferber*, 458 U.S. 747, 759 (1982) (emphasis added).

¹⁴⁶ *Id.* at 759.

¹⁴⁷ Audrey Rogers, *Protecting Children on the Internet: Mission Impossible*, 61 BAYLOR L. REV. 323, 327 n.9 (2009).

¹⁴⁸ *Ferber*, 458 U.S. at 752.

regardless of the social value of the depictions. For example, *a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless."* The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in *protecting children from psychological, emotional, and mental harm.*¹⁴⁹

The Petitioner's brief in *Ferber* describes the films in a bit more detail.¹⁵⁰ From this description, one film appears to be graphic "solo masturbation" and the other appears to be almost "solo masturbation," with some "mutual masturbation" between boys, a "suggestion" of oral genital contact.¹⁵¹ Therefore, factually, *Ferber* did not seem to require a filmed physical or sexual assault by an adult on a child in order for the material to be unprotected speech and harmful. Of course, these descriptions may differ from the actual film content. Even if such were the case, the analysis of *Ferber* still supports this concept.

b. *Ferber*'s Legal Analysis Supports This Concept of Harm

In its legal analysis, *Ferber* articulates a dual justification for placing child pornography outside First Amendment protection.¹⁵² These reasons confirm it is the use of children in production which causes concern not

¹⁴⁹ *Id.* at 774-75 (O'Connor, J., concurring- emphasis added); *see also id.* at 778 (Stevens, J., concurring) (describing the films as nothing more than lewd exhibitions).

¹⁵⁰ The brief states as follows, "The first film shows a naked boy lying face down on a bed, rubbing against the bed. After a while, the boy turns over onto his back and masturbates twice to ejaculation. Then, lying on his side, he places a dildo between his buttocks as if to insert it into his anus. The second film shows a naked young boy masturbating to ejaculation and inserting a dildo into his anus. The second film also includes scenes of other naked boys, including some no older than seven or eight years of age, jumping, sitting and reclining on a mattress. In addition, these boys are engaged in solo and mutual masturbation and in conduct suggesting oral-genital contact. At the end of the second film, the main child performer dresses very slowly, then picks up what appears to be United States currency and holds it toward the camera." *The People of the State of N.Y. v. Ferber*, No. 81-55, 1982 WL 608534, at **2-3 (1982).

¹⁵¹ *Id.* This is not to suggest these depictions are not disturbing or that they are self-produced as understood today. From these limited descriptions the role of any adult is unclear, but they were commercially available from which adult involvement can be inferred. This is merely to point out that the films in *Ferber* perhaps did not appear to depict an illegal adult on child sexual assault, yet the Court remained concerned.

¹⁵² *Ferber*, 458 U.S. at 758-59.

exclusively the sexual assault.¹⁵³ *Ferber* specifically lists five reasons why “[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children.”¹⁵⁴ The first is that the “[s]tate’s interest in ‘safeguarding the physical and psychological wellbeing of a minor is ‘compelling’” and that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”¹⁵⁵ The Court never limits these harmful effects to a sexual assault. Second, the Court found “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children...”¹⁵⁶ *Ferber* explicates the ways that depiction of juvenile sexual activity is related to abuse of children and these examples are not limited to physical assault. For example, the Court explained that the materials produced are a “permanent record of children’s participation and the harm to the child is exacerbated by their circulation.”¹⁵⁷ In other words, the children are exploited by the images themselves. The Court later expounds on this harm by noting how the resultant “pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”¹⁵⁸ Therefore, it is in part because the documents exist that makes them harmful. While the “second way” child pornography is related to sexual abuse is the need to close the distribution network, the Court did not limit itself to harm only in production. Both these articulated harms of the use of children damaging their physiological, emotional and mental health and the harm of the permanent record

¹⁵³ Critics of adjudication concede this. See, e.g., Humbach, *supra* note 140, at 457-59.

¹⁵⁴ *Ferber*, 458 U.S. at 756-763.

¹⁵⁵ *Ferber*, 458 U.S. at 756-58 (emphasis added).

¹⁵⁶ *Id.* at 759.

¹⁵⁷ *Id.* (emphasis added). Professor Rogers describes the Court’s analysis as recognizing a dual justification including “the actual and threatened harm to children inherent in the production and distribution of child pornography.” Audrey Rogers, *Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 856 (2008).

¹⁵⁸ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (emphasis added). Note that this sentence follows a description of the pornography as a record of “abuse.” Two observations concerning the word “abuse” can be made. First, “abuse” does not seem to be used synonymously with “sexual assault,” but rather expansively to include encompassing the creation of the “permanent record.” *Ferber*, 458 U.S. at 759 (pictures are “related to the sexual abuse of children” because they harm children through the creation of “a permanent record of the children’s participation.” Second, the Supreme Court seems to interchange words to describe its concern, suggesting “abuse” encompasses many forms of sexual exploitation. See *Ferber*, 458 U.S. at 759 (“sexual exploitation of children”); *Id.* at 757 (“sexual exploitation and abuse”); *Id.* at 761 (“issue of whether a child has been physically or psychologically harmed in the production”). See also *Osborne*, 495 U.S. at 109 (“exploitative use of children”); see *infra* notes 168-175 and accompanying text.

existing and circulating are discussed. The permanent record harming the child through circulation is not a minor interest. Indeed the Court goes onto to adopt the statement that:

Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.¹⁵⁹

The visual images created in self-produced child pornography manifest analogous harms. While children are no doubt more severely harmed in the production stage of conventional child pornography, children in self-produced child pornography are harmed. Those images document the youth's participation in the production and that is exacerbated by the circulation throughout the Internet.

The third reason articulated in *Ferber* is that the selling of child pornography is "an integral part" of production which is illegal.¹⁶⁰ Lastly, the Court recognizes the "exceedingly modest, if not *de minimis*" value of such images.¹⁶¹

c. *Ashcroft* Does Not Alter This

Some have argued that *Ashcroft* recharacterized *Ferber* as requiring a crime of illegal sexual assault in production in order to qualify as child pornography. Therefore, they claim, while self-produced child pornography may fall under child pornography under *Ferber*, it does not fall under *Ashcroft*.¹⁶² This is a potentially narrow reading of *Ferber* and overbroad reading of *Ashcroft*. The *Ferber* Court specifically articulates the harm as one that flows from "the use of children as subjects of pornographic material."¹⁶³ Explicitly, *Ferber* notes the "nature of the harm" must be clearly defined and it proceeds to define the harm of child pornography in terms of "works that visually depict sexual conduct by children below a specified age" – not in terms of sexual assault.¹⁶⁴

¹⁵⁹ *Ferber*, 458 U.S. at 760 n.10 (quoting Shouplin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981) (emphasis added)).

¹⁶⁰ *Ferber*, 458 U.S. at 761.

¹⁶¹ *Ferber*, 458 U.S. at 762. The fifth reason was simply that to rule as such was not inconsistent with prior law. *Id.* at 763.

¹⁶² Humbach, *supra* note 140, at 461-63, 467-68, 469-70.

¹⁶³ *Ferber*, 458 U.S. at 758 (emphasis added).

¹⁶⁴ *Id.* at 764 (emphasis added).

Ashcroft does indeed emphasize that the foundation of *Ferber* was its focus on production having certain characteristics. That characteristic can be read to be the involvement of real children not solely the involvement of a sexual assault.

Advocates of the more over-expansive reading of *Ashcroft* ground their argument primarily in one sentence in *Ashcroft* which describes *Ferber*'s speech prohibition as "based on how it was made," not on content.¹⁶⁵ The triggering aspect of how child pornography is made was the requirement of real children, not in the requirement that they are assaulted. Advocates of this view point to additional uses in *Ashcroft* of the words "crime"¹⁶⁶ and "abuse"¹⁶⁷ to describe child pornography. However, *Ashcroft* also utilizes other words such as "showing [children]," "using [children]," "depicting [children]," "involving [children]," and "produced with real children."¹⁶⁸ Similarly, although *Ferber* does use the word "abuse," as discussed, this seems not to be synonymous with "illegal."¹⁶⁹ Furthermore, "abuse" is one of many words used to describe the problem in *Ferber*, which also describes the harm as "works which portray sexual acts or lewd exhibition of genitalia by children,"¹⁷⁰ the "use of children as subjects of pornographic materials,"¹⁷¹ and "sexual exploitation."¹⁷² Specifically, it defines the "nature of the harm" not exclusively as illegal assault but in the "visual[] depict[ion] of sexual conduct by children below a specified age."¹⁷³ This use of the word "abuse" in *Ashcroft*, therefore, is (a) not necessarily synonymous with illegal sexual assault and (b) one of many words utilized to describe production and should not be taken further to signify a hidden shift in conceptualizing child pornography as only that which

¹⁶⁵ *Ashcroft*, 535 U.S. at 250 ("Ferber's judgment about child pornography was based on how it was made, not on what it communicated. The case reaffirmed that where speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.") An additional reason why this sentence should not be read to demand a sexual assault is because it cites to pages 764-65 in *Ferber* which contain no reference to sexual assault but do provide First Amendment protection for "depictions of sexual conduct . . . which do not involve live performance or photographic or other visual reproduction of live performances." (emphasis added).

¹⁶⁶ *Id.* at 250, 254.

¹⁶⁷ *Id.* at 249-51.

¹⁶⁸ *Ashcroft*, 535 U.S. at 239 ("using"); *Id.* at 240 ("depict an actual child" and "showing minors"); *Id.* at 241 ("images made using actual minors" but not "involv[ing]" actual children); *Id.* at 242 ("using" real minors); *Id.* at 250 (participants); *Id.* at 245-46 ("produced with real children"); *See also Ferber*, 458 U.S. at 758-59.

¹⁶⁹ *See supra* note 158.

¹⁷⁰ *Ferber*, 458 U.S. at 753 (emphasis added).

¹⁷¹ *Id.* at 758 (emphasis added).

¹⁷² *Id.* at 761 (emphasis added).

¹⁷³ *Id.* at 764 (emphasis added).

results from sexual assault. The Court's main concern in production was not a requirement of illegal sexual assault, but a requirement of real children as evidenced by its description of the *Ferber* images as "images made using actual minors."¹⁷⁴

This view that sexual assault is not required is supported by *Ashcroft's* comments regarding morphed images, to which the Court explicitly notes that its virtual child pornography holding does not apply. Morphed images are images in which people "alter innocent pictures of real children so that the children appear to be engaged in sexual activity."¹⁷⁵ These images do not involve a sexual assault or even contact at all with a minor in production, but they do implicate the concern of the Court – real children. "Although morphed images may fall within the definition of virtual child pornography, **they implicate the interests of real children** and are in that sense **closer to the images in *Ferber***."¹⁷⁶ While the Court expressly did not rule on the question of morphed images, it clearly distinguished images not by whether or not they involved a sexual assault, but by whether they involved the interests of real children. Like child pornography and morphed images, self-produced child pornography involves real children. If *Ferber's* interests are implicated, i.e. a child risks emotional and mental harm, when pictures of him are morphed into appearing as though he is engaged in sexually explicit conduct, then surely a child is harmed when actual pictures of him are circulated in which he is actually engaging in sexually explicit conduct.¹⁷⁷ This is consistent with subsequent case law which upholds convictions for morphed images, citing to *Ferber* and *Ashcroft*, because

Although there is no contention that the [identifiable minor whose face was placed on the body of a nude minor]. . . was involved in the production of the image, a lasting record has been created of . . . an identifiable minor child, seemingly engaged in sexually explicit activity. He is thus victimized every time the picture is displayed. . . .

The interests of real children are implicated in the image. . . . This image involves the type of harm which

¹⁷⁴ *Ashcroft*, 535 U.S. at 241.

¹⁷⁵ *Id.* at 242.

¹⁷⁶ *Id.* (emphasis added).

¹⁷⁷ Conversely, self-produced child pornography has little in common with virtual child pornography. The harms outlined in *Ferber* and *Osborne* are not present in the virtual pornography in *Ashcroft* where no real child is involved. One cannot "harm" a non-person: it does not have a reputation, inherent dignity, or a right to *parens patriae* protection. However, a real child can be harmed in self-produced child pornography.

can constitutionally be prosecuted under *Free Speech Coalition* and *Ferber*.¹⁷⁸

d. *Williams* Reasserts This as Well

Finally, *United States v. Williams*, the most recent Supreme Court child pornography decision, did not signal a requirement of sexual assault in two ways. First, it upheld a pandering provision that prohibited, *inter alia*, the pandering of material “intended to cause another to believe” it was child pornography or obscene visual depiction of minors. Secondly, it described *Ashcroft* as ruling that the child protection rationale for speech restriction does not apply to materials produced “without children.”¹⁷⁹ *Williams* clearly emphasizes the understanding of child pornography as requiring an actual child by using the word “abuse” once.¹⁸⁰ It defines child pornography as consisting of “sexually explicit visual portrayals that feature children.”¹⁸¹

Although *Williams* is the last child pornography opinion of the Court, as this article was going to print, the Court commented upon its

¹⁷⁸ *United States v. Bach*, 400 F. 3d 622, 632 (8th Cir. 2005). “[T]he creation and possession of pornographic images of living, breathing and identifiable children via computer morphing is not ‘protected expressive activity’ under the Constitution. . . . [T]hese images ‘implicate the interests of real children’ and are ‘closer’ to the types of images placed outside the protection of the First Amendment” *United States v. Hotaling*, 599 F. Supp. 2d 306, 321 (N.D.N.Y. 2008) (citing *Williams* 128 S.Ct. at 1841, *Ashcroft*, 535 U.S. at 242, 254). *Contra*, *State v. Zidel*, 940 A.2d 255 (N.H. 2008) (overturning conviction for child pornography possession of morphed images), *but see Hotaling*, 599 F. Supp. 2d at 319 (“The Court notes that the holding of *Zidel* is at odds with every other federal and state court which has confronted, even indirectly, the constitutional question . . .”).

¹⁷⁹ *United States v. Williams*, 128 S.Ct. 1830, 1836-1837 (2008). Notably, the Court did not say “without assault.” *See also id.* at 1836 (defining child pornography as “sexually explicit visual portrayals that feature children”); 1852 (referring to *Ashcroft*’s “real child requirement”).

¹⁸⁰ *Compare id.* at 1836 (explaining *Ashcroft* as holding “the child protection rational for speech restriction does not apply to materials produced without children.”) (emphasis added); *Id.* at 1837 (“feature actual children...produced using real children”); *Id.* at 1839, 1844 (“depicting actual children...produced with actual children”); *Id.* at 1841 (“involving actual children”), *with id.* at 1837 (quoting a statute regarding “abuse of real children”). Even the dissent in *Williams* understands *Ferber* and *Ashcroft* to only require real children, not sexual assault of real children, *Williams*, 553 U.S. at 1848, 1849 n.1 (“If, however, a photograph...shows an actual minor child as a pornographic subject its transfer and even possession may be made criminal...only pornographic photographs of actual children may be prohibited”) (emphasis added); *Id.* at 1848-49 (“depicting and pictured”); *Id.* at 1849 (“showing”) (Souter, J. dissenting). *See also Id.* at 1852, 1854, 1856.

¹⁸¹ *Id.* at 1836.

child pornography jurisprudence in a non-child pornography First Amendment case, *United States v. Stevens*.¹⁸² The reference to child pornography cases is somewhat brief and its significance remains unclear.

In *Stevens*, the government proposed that categorical exclusions from First Amendment protection could be determined merely by balancing the value of the speech against its social costs.¹⁸³ In rejecting this proposal, the Court used *Ferber* as an example of a “decision [that] did not rest on this ‘balance of competing interests’ alone.”¹⁸⁴ *Stevens* then reiterated the reasons *Ferber* articulated for excluding child pornography from First Amendment protection, offering several reasons why child pornography is a specific category of unprotected speech.¹⁸⁵ First, *Stevens* acknowledged the “compelling interest in protecting children from abuse.”¹⁸⁶ Second, *Stevens* noted “the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*.”¹⁸⁷ Third, *Stevens* mentioned that the “market for child pornography was ‘intrinsically related’ to the underlying abuse.”¹⁸⁸ In *Ferber*, of course, the Court expanded on the ways in which the material was related to abuse to include being harmful due to the “permanent record of the children’s participation.”¹⁸⁹ As discussed, this reference to “abuse” seems to include the abuse suffered by the existence of the

¹⁸² *United States v. Stevens*, No. 08-769, slip. op. (April 20, 2010).

¹⁸³ *United States v. Stevens*, No. 08-769, slip. op. at 7 (April 20, 2010).

¹⁸⁴ *United States v. Stevens*, No. 08-769, slip. op. at 8 (April 20, 2010) (emphasis added). Notably, the use of the word “alone” suggests *Ferber* does balance expressive interest against the harm to be restricted, among other considerations. See *id.*

¹⁸⁵ While *Ferber* stated five reasons and *Stevens* mentioned four, the fifth reason (that to do so was not inconsistent with earlier decisions) was irrelevant to the discussion. See *Ferber*, 458 U.S. at 763.

¹⁸⁶ *United States v. Stevens*, No. 08-769, slip op at 8 (April 20, 2010). This was the first reason articulated in *Ferber* which referred to the “compelling” interest in “safeguarding the physical and psychological well-being of a minor.” *Ferber*, 458 U.S. at 756-57.

¹⁸⁷ *Id.* This was the fourth reason articulated in *Ferber*. *Ferber*, 458 U.S. at 762.

¹⁸⁸ *United States v. Stevens*, No. 08-769, slip op at 8 (April 20, 2010). This was the second reason articulated in *Ferber*. *Ferber*, 458 U.S. at 759.

¹⁸⁹ *Ferber*, 458 U.S. at 759. *Stevens* here does not repeat this expanded explanation of this relationship, i.e. the harm to personality and stigma resultant from the existence of the images. While this might signify a shift in the Court’s emphasis within the five reasons for the exclusion, it is equally as likely that such a discussion about reputational harm and stigma is not mentioned because it is irrelevant to *Stevens*, an animal abuse case. Animals suffer no reputational harm from the documentation of their torture or the circulation of those images because they lack personhood. As such, for the Court to discuss this aspect of child pornography as it relates to animals would be almost a non sequitur.

images.¹⁹⁰ Finally, *Stevens* mentioned that the market for child pornography was an “integral part of the production of such materials, an activity illegal throughout the Nation.”¹⁹¹

Read in this context, *Stevens* can be seen as simply reiterating the validity of *Ferber*’s reasoning and as rejecting the sufficiency of simply balancing the interests. In it, the Court has used *Ferber* as an example of a case that had several reasons to exclude a category from First Amendment protection. *Stevens*’ emphasis on illegality by describing *Ferber* as “grounded” in a “previously recognized” category of unprotected speech seems to possibly be a reference to speech connected to illegal activity. This may suggest that child pornography by definition must depict an illegal sexual act. To reach this conclusion, however, requires one to divorce the reference to illegal activity from the other listed reasons child pornography is unprotected. Placed in context, the reference to illegality can equally be interpreted as a far less radical departure from *Ferber*.

Moreover, to understand *Stevens*, a non-child pornography case, as announcing a requirement of depicting illegality in all child pornography cases would produce collateral effects well beyond self-produced child pornography and “sexting” cases. Suddenly requiring unprotected material to display illegal conduct would legalize a broad swath of material always thought to be included under child pornography. It is difficult to imagine that the Court intended to exclude from the child pornography definition depictions of legal conduct including for example, such images as those of minor children of all ages masturbating themselves or each other (after an off - camera instruction to do so), children as young as fourteen engaged in sexual intercourse with their nearly eighteen year old step siblings, secret recordings of minors in locker rooms or other private locations, etc..¹⁹² Yet, any adult offender

¹⁹⁰ See *supra* Part V.1.a-c.

¹⁹¹ *United States v. Stevens*, No. 08-769, slip op at 8 (April 20, 2010). This was *Ferber*’s third reason for excluding child pornography from First Amendment protection. *Ferber*, 458 U.S. at 761-62.

¹⁹² The practical effect of such a shift would be to create a built in defense for adult defendants who would require the government to prove as an element of the offense of possession of child pornography the role of an adult in the exploitation. This is difficult to do when the modern reality is that the lack of an adult on screen and the lack of commercial distribution do not mean the images themselves lack an adult due to the fact that many images are not commercially manufactured. See Hearing Before the Senate Subcommittee on Investigations of the Committee on Governmental Affairs, S.Hrg. 99-18, at 104 (February 21, 1985) (“most child pornographers tend to be traders of the material rather than sellers.”). Notions of “coercion” by an adult or older person are even more difficult to assess in the case of child sexual abuse in which grooming the child to be a “willing” participant is a frequent aspect and the absence of filmed coercion need not be evidence of a lack of long term coercion.

trading in such images, under this new interpretation of *Ferber*, could argue such images are protected speech because, no matter how lascivious, the conduct depicted is not illegal. In addition, such would undermine previously well established doctrine of juveniles' inability to consent to participating in child pornography.¹⁹³ An intention by the Court to make such a massive shift would seem inconsistent with this brief reference in a non-child pornography case.

The significance of *Stevens* and its comments regarding, not only child pornography, but other historically recognized exceptions to First Amendment protections, and the Court's resistance to categorical exclusions remains to be seen. Its broad language could be an indication of a new direction the Court intends to travel. However, it is too early and its language too ambiguous to conclude it is now protecting a vast quantity of images previously considered child pornography.¹⁹⁴

e. Additional Harms Caused by the Images According to *Ferber*

While *Ferber* expresses this concern regarding children in the images, the Court's understanding of the harm is not limited only to that. *Ferber* further discussed other harms including the reality that sexual offenders use these images to groom children and whet their own appetites for such illegal material as well as the flooding of the market with such images of children.¹⁹⁵ Some argue that *Ashcroft's* holding that virtual child pornography is protected speech means that these arguments about the harm no longer have merit,¹⁹⁶ but such can be and overly-simplistic reading.¹⁹⁷

¹⁹³ See *infra* note 253.

¹⁹⁴ A full First Amendment analysis of *Stevens* is beyond the scope of this article. While the language is ambiguous, it seems too early to understand the implication of this analysis on criminal prosecutions, child pornography law, or new statutes targeting "sexting." Such a necessary study would be more insightful after an observation of *Stevens'* repercussions in lower courts in conjunction with the Court's subsequent treatment of it in a child pornography case.

¹⁹⁵ *New York v. Ferber*, 458 U.S. 747, 761-62 (1982).

¹⁹⁶ Humbach, *supra* note 140, at 460-62.

¹⁹⁷ Even if the characterization of *Ashcroft* as rejecting the validity of these arguments (as opposed to the sufficiency of the arguments) as a way of limiting speech were correct, that does not lead to the conclusion that these realities cannot be raised in our discussion of harm, as some suggest. Humbach, *supra* note 140, at 481. *Ashcroft* certainly found that the recognition that these pictures are used by others to facilitate assaulting children and contribute to a sexual objectification of children was insufficient to place them outside First Amendment protections. *Ashcroft*, 535 U.S. at 241-42. However, the recognition of the harm is not an irrelevant point in discussing whether the images are harmful. Similarly, while racist speech may be protected by the First

First, *Ashcroft* was addressing a very different legal issue than self-produced child pornography—virtual child pornography—which the Court explicitly stated was distinct from pornography with real children.¹⁹⁸ Virtual child pornography includes completely computer-generated images with no component of by real children.¹⁹⁹

Ashcroft held that virtual child pornography, as defined above and distinct from any image which involves an actual child, was protected speech.²⁰⁰ The Court's reasoning began with the presumption that the government should pass no law prohibiting speech. However, the Court recognized that freedom of speech has its limits and the two relevant limits for the CPPA were the categories of either obscene speech or "pornography produced with real children."²⁰¹ Because these proposed definitions did not require the images to be obscene, the obscenity doctrine could not support a claim that this material should be unprotected.²⁰² Similarly, because the definitions did not require real children to be used in production, that child pornography exception could also not support this claim.²⁰³ Therefore, the Court found these proposed definitions "inconsistent with *Miller* and finds no support in *Ferber*."²⁰⁴ The government attempted to argue that the Court should uphold the statutes also because of the additional harms caused by the pictures: i.e. that they are used by pedophiles to seduce children and whet their appetites to offend against children.²⁰⁵ The Court refused to conclude that this alone, absent the inducement of any real children, was sufficient to render the material, which was neither obscene nor child

Amendment, hopefully all agree that racist speech is also harmful. Surely it is not objectionable to cite to legislative, social science, and judicial assertions of same as relevant support for the claim that such material is harmful. Because that harm is insufficient to deny First Amendment protection, does not mean the assertion that such harm exists has been rejected by the Court.

¹⁹⁸ At issue in the case were two definitions in the Child Pornography Prevention Act (CPPA): 18 U.S.C. §2256(8)(B), (D) (2006). Section 2256(8)(B) expanded the federal definition of child pornography beyond pornographic images of real children to include "any visual depiction. . . [that is, or appears to be] that of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B); *Ashcroft*, 535 U.S. at 241. Section 2256(8)(D), the so called pandering provision, defined child pornography similarly "to include any sexually explicit image that was 'advertised, promoted, presented, described, or distributed in such a manner that 'conveys the impression' it depicts 'a minor engaging in sexually explicit conduct.'" *Ashcroft*, 535 U.S. at 242. (quoting 18 U.S.C. § 2256(8)(D)). *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Ashcroft*, 535 U.S. at 253.

²⁰¹ *Id.* at 246.

²⁰² *Id.* at 248-49.

²⁰³ *Id.* at 246.

²⁰⁴ *Id.* at 251.

²⁰⁵ *Id.* at 252.

pornography, unprotected.²⁰⁶ It is overly simplistic to say the Court rejected the existence of these additional harms.

Unlike virtual child pornography which the Court has excluded from the definition of child pornography, self-produced child pornography is by definition child pornography. It depicts real children engaged in sexually explicit conduct. *Ashcroft* struck down the CPPA because “[b]y prohibiting child pornography that does not depict an actual child the statute goes beyond *Ferber* which distinguished child pornography from other sexually explicit pornography because of the [s]tate’s interest in protecting the children exploited by the production process.”²⁰⁷ In self-produced child pornography real children are exploited. The question of illegality is established and, unlike virtual child pornography, self-produced child pornography falls squarely within the offense of child pornography.

Having established self-produced child pornography can fall within the definition of child pornography, the next question to be examined regards the propriety of allowing these illegal images to lead to prosecution. Simply because something can fall under a statute does not mean that it should result in prosecution. That requires an examination of whether such a procedure is a positive use of prosecutorial discretion. This question of prosecutorial policy not only appropriately considers the harm to society of the criminal activity, but must consider this harm to others. As stated in the original article, in the sense of short term harm, children in self-produced child pornography images are not harmed as significantly as children sexually assaulted in production.²⁰⁸ However, in another sense, long-term harm exists because the images

²⁰⁶ *Id.* at 253-54; Leary, *supra* note 137, at 34, 40. Another aspect of this rejection to consider is that the Court felt that the government was unable to establish that virtual child pornography and child abuse are “intrinsically related.” *Ashcroft*, 535 U.S. at 250. Since 2002 more research has been developed to support the argument that possession of child pornography and abuse of children at least correlate to each other. For example, Michael Seto’s research in this area suggests that child abuse images possession may be a “stronger indicator of pedophilia than is [previously] sexually offending against a child.” Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia*, 115 J. OF ABNORMAL PSYCHOL. 610, 613 (2006). Similarly, researchers Bourke and Hernandez recently concluded “Internet offenders in our sample were significantly more likely than not to have sexually abused a child via a hands-on act.” Michael L. Bourke & Andres E. Hernandez, *The “Butner Study” Redux: A Report of the Incident of Hands-on Child Victimization by Child Pornography Offenders*, 24(3) J. FAM. VIOL. 183-191 (2009); *but see*, Jerome Endrass, et al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC PSYCHIATRY 43 (2009).

²⁰⁷ *Ashcroft*, 535 U.S. at 240 (emphasis added).

²⁰⁸ Leary, *supra* note 137, at 40.

enter the internet for perpetuity without any control over them by children depicted in the images. The suggestion that the prosecutors should not consider both these realities in making their prosecutorial decision is misplaced.

*2. That the Pictures Themselves are Harmful is Consistent with
Contemporary Case Law Conceptualizing the Harm of Child
Pornography*

The idea that a significant harm caused by child pornography includes the harm from the existence and distribution of the images is also apparent in other lines of child pornography cases. Courts have not limited the concept of harm to only the trauma consciously suffered at the time of production.²⁰⁹ That is why courts have continued to uphold child pornography convictions when the child was unaware of the sexual filming either because it was surreptitious or because the child was too young to carry the emotional or physical scars of the sexual contact.²¹⁰ Similarly, some victims of child pornography series are unaware of the filming and posting to the Internet of hundreds of now heavily traded

²⁰⁹ E.g. *Gilmour v. Rogerson*, 117 F.3d 368, 371 (8th Cir. 1997) (describing *Ferber's* purpose in banning child pornography as “reduc[ing] financial incentives that encourage [the] sexual exploitation of children and [decreasing] the production of [images] that exacerbate psychological harm to the child victims”).

²¹⁰ See *United States v. Helton*, 302 Fed.Appx. 842 (10th Cir. 2008), cert den'd 129 S.Ct. 2029 (2009) (conviction for producing child pornography upheld where defendant secretly videotaped minors in states of nudity utilizing a bathroom); *Sven v. Chandler*, 2009 WL 3335347 (N.D. Ill. Oct. 15, 2009) (denying habeas relief for a defendant convicted of state child pornography charges for secretly filming his babysitter bathing with his infant child); *State v. Myers*, 207 P.3d 1105 (N.M. 2009) (restating a conviction for child pornography offenses where defendant had secretly taken pictures of minors in a state of undress utilizing a bathroom without knowledge). Notably, in such cases the conduct depicted is legal conduct, yet the images are still considered child pornography. Regarding children too young to recall the abuse, *c.f.* *United States v. Pugh*, 515 F.3d 1179, 1182-83 (11th Cir. 2008) (reversed a probationary sentence for the possession of child pornography where the defendant admitted to downloading sixty-eight images of child pornography which included, among other items, an infant being raped). The Circuit Court, in vacating the sentence, found this sentence, *inter alia*, failed to reflect the seriousness of the offense or, a pertinent policy statement. *Id.*

images.²¹¹ Yet, courts do not question that similarly situated victims are harmed because of the existence of the images being circulated.²¹²

For example, courts have often explicitly recognized the harm caused to children through the possession of child pornography. In that context, courts have recognized that possession is not a victimless crime and a victim is repeatedly harmed each time the image is viewed. This recognition is not reserved only for the assaulted. Circuit Courts have found in the context of sentencing and interpreting the word “victim” that the children depicted in the images and society as a whole are victims.²¹³ In her discussion of the dual harm of child pornography, Professor Rogers analyzes the harm to the victim by subsequent viewing and possession by unknown consumers as significant and actual. “[W]hen the pornographic images are viewed by others, the children depicted are victimized once again. The mere knowledge that images exist and are being circulated causes shame, humiliation, and powerlessness. This victimization lasts forever since pictures can resurface at any time, and this circulation has grown exponentially because of the Internet.”²¹⁴

This prediction is also supported by many recent cases considering restitution to victims of pornography pursuant to federal law making restitution mandatory in child pornography offenses including possession.²¹⁵ For example, the Eastern District of Virginia recently awarded restitution to the child depicted in the “Vicky” child

²¹¹ Testimony of Masha Allen to the House Energy and Commerce Committee, Subcommittee on Oversight and Investigations, May 3, 2006, at 1, available at <http://archives.energycommerce.house.gov/reparchives/108/Hearings/05032006hearing1852/Allen.pdf>.

²¹² *E.g.*, *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260 (E.D.Va. Nov. 24, 2009).

²¹³ *United States v. Boos*, 127 F.3d 1207 (9th Cir. 1997) (rejecting *Toler* and asserting the primary victim is the child in the image, and there is a secondary effect to society as a whole); *United States v. Rugh*, 968 F. 2d 750, 755, (8th Cir. 1992); *United States v. Ketcham*, 80 F.3d 789, 792-93 (3d Cir. 1996) (same); *United States v. Toler*, 901 F. 2d 399 (primary victim is society as a whole).

²¹⁴ Audrey Rogers, *Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 853 (2008).

²¹⁵ 18 U.S.C. § 2259 (2006); *United States v. Renga*, 2009 WL 2579103 (E.D. Cal. Aug. 19, 2009) (restitution mandatory for possession of child pornography); *United States v. Zane*, 2009 WL 2567832 (E.D. Cal. Aug. 18, 2009); *United States v. Monk*, 2009 U.S. Dist. LEXIS 80344 (E.D. Cal. Aug. 18, 2009) (same). In fact, the District of Minnesota recently expressed dismay at the government's failure to seek restitution under § 2259. The Court ordered the government to explain why the victim is not entitled to restitution. *United States v. Buchanan*, No. 09-CR-0045, 2010 U.S. Dist. LEXIS 165 at *3 (Dist. Minn. Jan. 4, 2010).

pornography series²¹⁶ from a subsequent possessor.²¹⁷ In so doing, the Court noted that “[r]eceiving and viewing child pornography inflicts an injury upon the child depicted by violating his or her privacy, contributing to the cycle of abuse, and perpetuating a market for the sharing of the material.”²¹⁸ Similarly, although finding a lack of proximate cause under the specific facts, a Texas District Court found the subject of child pornography was harmed by the later possession by a subsequent user.²¹⁹ In short, the documentation itself harms these children.

These accounts of harm to the children through the subsequent viewing of the materials are supported by the children in conventional child pornography themselves. The victim of the “Vicky” series stated in her victim impact statement that the knowledge of the images being circulated around the world is devastating.

This knowledge has given me paranoia. I wonder if the people I know have seen these images. I wonder if the men I pass at the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, I feel out of control.²²⁰

This victim has further stated she is “in constant fear that she will be recognized by someone in the public as being the person depicted in these child pornographic videos and photographs. . . [and] of people watching her on line.”[sic]²²¹ Masha Allen’s images were placed on the Internet without her knowledge. In her testimony before Congress, she noted,

I got much more upset when I found out about the pictures of me that he [the producer] put on the Internet.

²¹⁶ Child pornographers sometimes create a series of images of their victims for trade among like-minded offenders. The Vicky child pornography series is a series of images with the same victim known to the public as “Vicky.” See Mary Graw Leary, *Death to Child Erotica*, 16 CARDOZO J.L. & GENDER 1, 24-25 (2009) (defining child pornography series).

²¹⁷ E.g., *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260 (E.D. Va. Nov. 24, 2009).

²¹⁸ *Id.* at *2 (citing *United States v. Sherman*, 268 F.3d 539, 547 (2001)).

²¹⁹ E.g., *United States v. Paroline*, No. 6:08-CR-61, 2009 WL 4572786 (E.D. Tex. Dec. 9, 2009), mandamus denied, *In Re Amy*, 591 F.3d 792 (5th Cir. 2009) (government met burden of establishing victim harmed by subsequent possessor, but did not establish the proximate cause for the amount of damage asserted in restitution); *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998) (end user of child pornography causes the children depicted to suffer).

²²⁰ *Hicks*, 2009 WL 4110260, at *3.

²²¹ *United States v. Faxon*, 2010 WL 430760, *5 (S.D. Fla. Feb. 5, 2010).

I had no idea he had done that. When I found out about it I asked our lawyer to get them back. He told me we couldn't do that. Then I found out that they would be there forever... [B]ecause Matthew [the producer] put my pictures on the Internet the abuse is still going on. Anyone can see them. People are still downloading them... *I'm more upset about the pictures on the Internet than I am about what Matthew did to me physically.*²²²

Similarly, the victim of the "Misty" series of child pornography stated in her victim impact statement:

Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them – at me – when I was just a little girl. . . I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. . . .

. . . .

. . . .

. . . .

. . . .

. . . .

. . . I am worried that when my friends are on the internet they are going to come across my pictures and it fills me with shame and embarrassment.²²³

It is easy to dismiss these realities as only applying to children who have been sexually abused. Surely, this harmful impact is more serious when the images are of a sexual assault. However, these statements apply as well to children who pose for pictures "willingly" which are then distributed. The knowledge that their images are floating on the Internet and out of the control of the victim can be devastating.

²²² *Sexual Exploitation Of Children Over The Internet: What Parents, Kids And Congress Need To Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce, 109th Cong. 3-4 (2006) (testimony of Masha Allen) available at <http://archives.energycommerce.house.gov/reparchives/108/Hearings/05032006hearing1852/Allen.pdf>. (emphasis added).*

²²³ *Document: Victim Impact Statement of Girl in Misty Series, THE VIRGINIAN PILOT, Oct. 25, 2009, available at <http://hamptonroads.com/2009/10/document-victim-impact-statement-girl-misty-series>.*

3. *That the Pictures are Harmful in and of Themselves is Consistent with Practical Observations Regarding Self-Produced Child Pornography*

The words quoted by the Supreme Court can apply to self-produced child pornography as well.

[Pornography] poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.²²⁴

This was certainly felt in the cases of Jessica Logan and Hope Witsell, two victims of sexting or self-produced child pornography. In the spring of 2008, high school student Jessica Logan, and three friends took pictures of themselves which displayed nudity. Jessica later sent one such picture to her then boyfriend, who allegedly forwarded it to four other students, two of whom were minors. The pictures were circulated throughout at least four schools. Jessica's efforts to stop their circulation failed and she was the subject of humiliation, taunting, and bullying. She even went public with her story on television to warn other teens of the harms of "sexting."²²⁵ She outlined and expressed the harms felt by sending such pictures and their subsequent further distribution. The realization of the lack of control over the photos combined with the resultant teasing allegedly contributed to this once vibrant popular high school student killing herself, the victim of others disseminating this image.²²⁶ Thirteen year-old Hope Witsell similarly took her own life after she sent a topless photograph to a boy to whom she was attracted. The photo was then further disseminated beyond her own middle school.

²²⁴ *Ferber*, 458 U.S. at 758-60 n.9 (internal quotations and citations omitted); "Direct harm is eviden[ced] when an actual child is depicted in an image." Audrey Rogers, *Protecting Children on the Internet: Mission Impossible*, 61 BAYLOR L. REV. 323, 352 (2009). This direct harm is arguably present in self-produced child pornography.

²²⁵ Bob Stiles, *Effort Begins to Standardize Sexting Penalty*, PITTSBURGH TRIB.-REV., Apr. 1, 2009. Although Jessica was 18 at the time, her case provides important analogous evidence of the harm to high school students when such images are circulated.

²²⁶ Complaint at 2-4, *Logan v. Salyers*, No. A0904647, Ct. Com. Pl. Hamilton County, Ohio; Dan Horn, *Suit: Sexting Lead to Suicide*, CINCINNATI ENQUIRER, Dec. 4, 2009. Ms. Logan is referred to in the media alternatively as "Jessica" and "Jesse." Because the name Jessica is used in the pleadings, that is what is used here.

After incessant taunts, threats, name calling, and embarrassment, she also hanged herself.²²⁷

These harms, implicated by the images themselves are well recognized. The National Center for Missing and Exploited Children and others have documented that “sexting” can lead to “serious and unintended consequences – including becoming the victim of enticement, blackmail, harassment and exploitation by both adults and other youth.”²²⁸ The potential harms documented, “stretch[] beyond sexual exploitation and embarrassment to commercial exploitation and even death,” and include negative long-term effects on employment or college admission.²²⁹ Professor Calvert suggests several types of harm or negative consequences flow from this behavior including mental anguish, harassment, economic harm, punishment (parental, school

²²⁷ Andrew Meacham, *A Shattered Self-Image*, ST. PETERSBURG TIMES, Nov. 29, 2009. . The assertion that the harms of self-produced child pornography share nothing with conventional child pornography are belied by cases such as these. While some point to the *Logan* and *Witsell* cases as reasons not to prosecute questioning how these girls could be helped by adding to their stress a threat of prosecution. This is a valid criticism of a mandatory prosecution regime. However, under the structured prosecutorial discretion model, those girls would not be prosecuted at all (even if the pictures were pornographic and Logan were 17, which she was not in actuality). Structured prosecutorial discretion would give the prosecutors discretion to adjudicate the juveniles in the *Witsell* case who rather viciously circulated the images which may have, as part of a multidisciplinary response deterred the distribution and given at least Hope a sense of control and community support, rather than overwhelm.

²²⁸ Policy Statement on Sexting, The National Center for Missing & Exploited Children, Sept. 21, 2009, *available at* http://www.missingkids.com/mmissingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130; Janet Lundquist, ‘Sexting’ an explosive issue locally: Teens think sexting is harmless, but sending explicit pictures can blow up in their faces, PLAINFIELD SUN, Jan. 10, 2010 (“[e]ven if teens aren’t charged with felonies, they face public humiliation on a potentially national stage and damaging future consequences” such as the image interfering with employment or college applications); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM. LAW CONSPECTUS 1 (2009); Christopher Ruvo, *The Bad Side of Sexting*, THE INTELLIGENCER, Nov. 4, 2009.

²²⁹ Calvert, *supra* note 228, at 4, 23-24; U.S. Youth Suicides Linked to ‘Sexting’ but Trend Rises, THE INDEPENDENT, Dec. 4, 2009. This is more than just speculation. A recent market research report examined the impact of “online reputations” in professional and personal lives and found that recruiters and human resource professionals conduct deeper searches of online reputations than consumers thought justified with 84% of American human resource personnel searching personal data posted online. Fifty-five percent of such recruiters reported unsuitable photographs or video was a reason that influenced a candidate’s rejection. Online Reputation in a Connected World, Cross Tab at 7, 9 (2010), *available at* <http://www.microsoft.com/privacy/dpd/research.aspx>.

based, criminal) and social stigma.²³⁰ The cases of Jessica Logan and Hope Witsell demonstrate the harassment by other students. Eighteen-year-old Anthony Stancl pled no contest to creating a fictional Facebook account appearing to belong to a girl and duping thirty-one other teen boys into sending him sexually explicit pictures. He then used the pictures as blackmail to force several of the boys to perform sexual acts with him in exchange for his silence.²³¹ Stancl had in his possession over 300 pictures of boys in the Eisenhower high school and pled no contest to two of the original twelve charges.²³² None of the boys had reported this blackmail. Similarly, a fourteen-year-old high school student blackmailed several young girls into sending nude pictures to him and was adjudicated delinquent for his multiple victim crimes.²³³ A New York boy allegedly collected pictures that several teenage girls had sent their boyfriends and created a DVD for commercial availability.²³⁴ This activity can also be harmful to recipients of such unwanted materials.²³⁵

Youth who have engaged in this behavior have articulated the harm of realizing the photos are in existence and beyond their control for the rest of their lives. They have discussed the anxiety and fear of them resurfacing years later. One young female who sent a nude image of herself described being scared because “the picture is always there in the back of my mind.”²³⁶ Consistent with many former senders of such

²³⁰ Calvert, *supra* note 228, at 23-24.

²³¹ Susan Saulny, *Sex Predator Accusations Shake a Wisconsin Town*, N.Y. TIMES, Nov. 1, 2009, available at <http://www.nytimes.com/2009/02/11/world/americas/11iht-11wisconsin.20101124.html>.

²³² Dinesh Ramde, *Wisconsin Teen Reaches Plea Deal in Facebook Sex Scam*, THE LEDGER, Dec. 22, 2009, available at <http://www.theledger.com/article/20091222/NEWS/912225043/1410?Title=Wisconsin-Teen-Reaches-Plea-Deal-in-Facebook-Sex-Scam>; Bonnie King, *Wisconsin Teen Gets 15 Year Sentence for Sex Blackmail via Facebook*, SALEM-NEWS, Mar. 1, 2010, available at http://www.salem-news.com/articles/march012010/sex_blackmail.php.

²³³ *Student to spend 1 year in juvenile detention for sexting: Fourteen Year Old Whitnall Student Blackmailed Underage Girls*, ABC WISN, Jan. 13, 2010, available at <http://www.wisn.com/news/22228269/detail.html>.

²³⁴ Stephanie Reitz, *Teens Sending Nude Photos Via Cell Phones*, ASSOCIATED PRESS, June 4, 2008; see also, Hill, *supra* note 18.

²³⁵ *Id.* (discussing Utah boy charged for sending photos of himself to several girls).

²³⁶ Larry Magid, *MTV's Sexting Show to Air Stark Message for Teens*, CNET News (Feb. 13, 2010), available at http://news.cnet.com/8301-19518_3-10453101-238.html; *Sexting in America: When Privates Go Public*, Feb. 14, 2010, available at <http://www.mtv.com/videos/news/483803/sexting-in-america-when-privates-go-public-part-3.jhtml#id=1631892> (former ‘sexter’ describes the action as the “biggest mistake of my life” and “no matter what the picture is always there in the back of my mind”).

material is not only regret but an anxiety of knowing such images are out and possibly will surface or be seen by others.²³⁷

Clearly, therefore, the concerns of the Supreme Court, Congress, internet safety experts, youth, and individuals themselves are present in self-produced child pornography.²³⁸ These harms exist, are real, and manifest with or without sexual assault during production. Notwithstanding that reality, the fact remains that simply because one can prosecute a juvenile, that does not mean that one should do so. Under the structured prosecutorial discretion model, even with new statutes that address self-produced child pornography, it would be rare. However, this model, particularly when combined with new statutes tailored to this behavior, leaves that decision with the prosecutor, applying objective factors. Other solutions conclude that even if these images can be prosecuted they never should be²³⁹ or that they always should be. This spectrum of solutions will be discussed *infra*, and structured prosecutorial discretion can be utilized under a range of statutes, but invites the prosecutor to examine if they should be on a case-by-case analysis.

B. SPECTRUM OF SOLUTIONS

Since the drafting of the original article, many new voices have been added to the debate. With the revelation of the frequency of juveniles engaging in this behavior, as well as the manifestation of the arguments highlighting negative legal ramifications, commentators, scholars and legislators have struggled with responding. The solutions that have percolated throughout the nation have ranged greatly. In fact they are so

²³⁷ Leonore Vivanco, *Unprotected Text*, CHI. TRIB. (Feb. 4, 2009). This has been described as a permanent record of youthful indiscretion that does not go away.

²³⁸ "The creation and dissemination of pictures of nude minors created by minors themselves may, in fact, create many of the same harms outlined in *Ferber and Osborne*." W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes and Saved by the Bell: Introducing a Lesser Juvenile Charge With an "Aggravating Factors" Framework*, 77 TENN. L. REV. 1, 16-17 (2009).

²³⁹ Some argue that the Supreme Court in *Ferber* did not address the facts present in a self-produced pornography situation and self-produced child pornography does not fall under it. The question is not whether *Ferber* specifically addressed the factual scenario of self-produced child pornography for *Ferber* did not specifically address many of the factual scenarios presently characteristic of modern child pornography cases such as non-commercial production of child pornography, peer-to-peer file sharing trading of images, the use of the Internet in its dissemination to name a few. Yet, none would argue that *Ferber* does not apply to these situations. The critical question is whether the dual bases articulated by the Court in *Ferber* are present in a given case: i.e. the use of real children in production and the physiological, emotional, and mental harm the images cause. Real children and such harms are present in self-produced child pornography.

varied they lie on a spectrum from advocating decriminalization to expanding criminal laws to ensure they cover this behavior. These different solutions will be examined *seriatim*. It is apparent that many contain some of the critical touchstones of structured prosecutorial discretion: multi-disciplinary, juvenile court, avoidance of sex offender registration. Within many of these new paths structured prosecutorial discretion remains effective, by placing the discretion in the hands of the person investigating the case and particularly with new, less severe charging options.

1. Formal Decriminalization

Early on in the debate there were some who called for essentially a decriminalization of self-produced child pornography when minors were involved.²⁴⁰ For example, Vermont legislators originally proposed a statute that effectively exempted minors from child exploitation statutes.²⁴¹ Ultimately, the Vermont legislature did not accept this proposal and passed more limited legislation.²⁴² However, some continue to suggest this should simply not be criminal.²⁴³ Such a position is erroneous for several reasons.

First, such a position assumes that the children in the images are not harmed. As discussed, the unique harm of child pornography is not only the activity captured in the image, but the fact that it is memorialized out of the control of the child subject for eternity. It is the perpetuity of the victimization that is uniquely devastating to these children. Consistent with research in the area of non-self-produced child pornography, as well as the voices of victims themselves, these children are likely to experience depression, anxiety, low self-esteem, and other effects from the fact that these images will be circulating forever.²⁴⁴

²⁴⁰ S. 125, 2009-10 Leg., Leg. Sess. (Vt. 2009-10); *see also* Humbach, *supra* note 140, at 467; Levick, *supra* note 139.

²⁴¹ S. 125, 2009-10 Leg., Leg. Sess. (Vt. 2009) (“[a] minor who violates subsection (a) [knowingly and voluntarily and without threat or coercion use[s] a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person] . . . shall not be prosecuted”). Arguably, Nebraska’s affirmative defense scheme does this as well. *See infra*, part V. B. 7(a).

²⁴² 2009 Bill Text VT S.B. 125, §2802b.

²⁴³ Humbach, *supra* note 140, at 438 (suggesting that auto pornography by teenagers is a constitutional right); *Id.* at 456 (documenting teens “own lawful sexuality.”). Professor Humbach’s scholarship is a welcome contribution to this discussion as he reminds us of important constitutional considerations. We share a commitment to the rule of law within constitutional limitations, and we all benefit from his insightful questioning and advocacy for children.

²⁴⁴ *See supra* Part V.A.; Leary, *supra* note 137, at 10.

Advocates of decriminalization take a variety of positions. For some, it is part of a larger challenge to obscenity and child pornography laws,²⁴⁵ others claim no harm occurs in self-produced child pornography because it is simply an effort to express oneself.²⁴⁶ Most, however, do acknowledge that the activity creates a risk of harm.²⁴⁷ However, upon comparing that harm to the harm of a state-ordered sanction, they question the wisdom of further harming these children by subjecting them to legal sanctions and in the name of protecting them.²⁴⁸ This argument quite rightly demands a consideration of the negative consequences of state interaction. Moreover it compels society to ensure that the consequences felt by potential juvenile offenders are consistent with rehabilitation, not more damaging than helpful. Therefore, this concern supports procedures for objectively evaluating cases to ensure that only severe cases are considered, cases are only prosecuted in juvenile court, and eliminating sex offender registration as a potential consequence. However, the conclusion that it demands decriminalization does not follow.

Decriminalization's "one size fits all" solution fails to distinguish between offenders. Ironically the decriminalization theory is guilty of the

²⁴⁵ For a provocative challenge to not only "sexting" legislation, but to child pornography and obscenity jurisprudence. See Humbach, *supra* note 140.

²⁴⁶ *Id.* at 438-443. Some also challenge prosecution based on the large numbers of youth who may engage in this behavior. *Id.* at 438, 452, 472, 483 ("millions."). As discussed, the amount of this behavior varies among the surveys. However, even assuming large numbers of teens engage in this behavior, such is not a reason to decriminalize. Large numbers of youth drink alcohol and ingest illegal narcotics. CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE (2007) (45% of teenagers drink alcohol, 25% binge drink); CENTERS FOR DISEASE CONTROL AND PREVENTION, TRENDS IN THE PREVALENCE OF MARIJUANA, COCAINE AND OTHER ILLEGAL DRUG USE (1991-2007). Society does not decriminalize such actions. It does not do so because these actions can be harmful (even if no harm is actually experienced, i.e. there is no drunk driving accident or drug related accident or injury). Instead society leaves these actions as illegal, but allows prosecutors the discretion to determine when laws should be enforced and when the desired effect has already been established. See also *Gilmour*, 117 F.3d at 372; Jeffrey Boyles, *Sexting Bill Strikes Fair Balance*, DAILY RECORD, Feb. 12, 2010, at 1.

²⁴⁷ E.g., *Sexting, the Ineffectiveness of Child Pornography Laws*, ABA Criminal Justice Section Juvenile Justice E Newsletter, June 2009 ("No one is denying the injurious consequences that could befall a juvenile who sends nude or otherwise explicit pictures of him or herself....").

²⁴⁸ See Ferguson, *supra* note 138, at 1. Humbach, *supra* note 140, at 450 (categorical exclusion of child pornography from First Amendment protection can have potentially devastating effects on the lives of teens who may find themselves prosecuted); Smith, *supra* note 140, at 544; Calvert, *supra* note 228, at 60-61.

same faults it seeks to avoid. Advocates of decriminalization complain that the problem of child pornography charges being available is that such a response is too blunt and does not consider that these children are different than those contemplated in conventional child pornography. However, decriminalization is equally blunt by failing to distinguish factual situations. By treating all youth identically regardless of motive, profits, or coercion, it risks creating an exception to criminality for some who do not merit such an exception. Decriminalization will not accomplish the particularity it seeks.²⁴⁹

Second, decriminalization is an impediment to law enforcement's ability to investigate suspected child sexual exploitation. Before the phenomenon of self-produced child pornography, there were many images in which groomed and coerced children appeared to be willing subjects. However, it is not until there is an investigation into the production of a particular image that law enforcement can know the actual situation. We now possess a growing recognition that pressure and coercion play a large role in this behavior.²⁵⁰ Pictures can be evidence of exploitation, blackmail, bullying, teen dating violence, etc. Moreover, if an adult is involved, the situation could include sexual assault, online luring, and prostitution. If, however, the law changes such that an image in which the child appears willing to pose becomes legal, police may lack probable cause to investigate the image's production. Failure to investigate means society risks missing an opportunity, often the only opportunity, to investigate and rescue the child from continued molestation, blackmailing, or exploitation.

Third, such a position provides a built-in defense for the ultimate consumer of these images: the adult offender. Once these images are on the Internet they can make their way to the newsgroups, peer-to-peer file-sharing networks, and email of those who use these images to validate their own sexual proclivities for children. When possessing an

²⁴⁹ Structured prosecutorial discretion is more fact specific and would protect youth who are not in danger of repeating this behavior or whose incursion was minimal, from any sanction, and the diversionary programs would accomplish the education. For a discussion of diversion see *infra* Part V.B. However, decriminalization treats all disseminators the same and some are more in need of deterrence and rehabilitation than others. *Avon Man Arrested For Sexting*, 13 WHAM, Jan. 13, 2010 (documenting charging of an eighteen-year-old previously adjudicated sex offender with several charges including "disseminating indecent material to a fifteen year old girl."); Catey Hill, *Eighth-Grade Boy Sells Nude 'Sexts' of Girlfriend for \$5 A Piece*, NY DAILY NEWS.COM, Mar. 9, 2010, available at http://www.nydailynews.com/news/2010/03/09/2010-03-09_eighthgrade_boy_allegedly_sells_nude_sexts_of_girlfriend_for_5_a_piece.html (boy accused of selling nude photos of his girlfriend for \$5 apiece).

²⁵⁰ See *supra* notes 64-66 and accompanying text.

image in which a child appears willing to pose, a defendant will claim that it was “voluntarily produced” and, therefore, does not meet the definition of child pornography. Therefore, an adult possessor of such a self-produced image, or an image that appears self-produced, could be able to argue that he or she indeed possesses protected “speech.”²⁵¹

Fourth, all children in pornographic images are victimized when these images are viewed throughout the Internet²⁵² and all should be protected from this secondary victimization, not just the “more innocent ones.” As a matter of law children do not have the ability to consent to being exploited.²⁵³ Therefore, creating a two-tiered system where we label self-produced child pornography as valid decision-making and child pornography non-consensual (a) contradicts the basis of child protection laws that children cannot consent to exploitation and (b) protects only some children from secondary victimization, but denies such protection to others. Historically, there was once a prevalent view that some children and women, who appeared less virtuous, were worthy of less protection. Thankfully, society is moving away from blaming victims because “she deserved it for the way she behaves” mentality. Indeed, our child abuse and pornography laws reflect a basic understanding that children cannot consent to sexual abuse and

²⁵¹ Such has been claimed by defense counsel. *E.g. Adam Silverman, Legislature Considers Legalizing Sexting*, BURLINGTON FREE PRESS, Apr. 13, 2009 (quoting defense counsel in child pornography case of claiming innocence because the “girls participated willingly”); New Hampshire declined to adjust its laws regarding child pornography because *inter alia* it did not want to protect child sexual offenders or decrease the ability to address dissemination. Shira Schoenberg, *Sexting Not on the Agenda*, CONCORD MONITOR, Sept. 11, 2009. Similarly, one of the reasons the Indiana pending bill was delayed was because of a possible loophole that could “provide legal cover to sexual predators.” Jon Seidel, *Sexting Bill Headed for Study*, POST TRIB., Feb. 17, 2010, at 1.

²⁵² 18 U.S.C. § 2259 (2006) (ordering restitution for child pornography victims); Timothy Magaw, *Proposals Seek ‘Sensitive Balance’ In Teen Sexting*, DAILY HERALD, Feb. 11, 2010, at 1 (quoting the author of proposed Iowa legislation as expressing concern that SPCP sent to adults will be distributed as child pornography on the Internet).

²⁵³ *E.g. Commonwealth v. Kitchen*, 814 A.2d 209 (Pa. Super. Ct. 2002); *United States v. Raplinger*, 555 F.3d 687 (8th Cir. 2009) (“[C]onsent of a child victimized by having pornographic pictures taken of him/her is ...of no moment. Clearly no one can legally take pornographic photographs of a child regardless of whether the child consents.”); *Kitchen*, 814 A.2d at 213 (affirming rejection of consent defense in child pornography case in which defendant photographed the sixteen year-old mother of his child who willingly engaged in sexual conduct with him and continued a relationship with him); *Raplinger*, 555 F.3d at 687 (affirming district court’s jury instruction that consent is no defense to child pornography charge where defendant took pictures of sexual contact with a very willing minor girlfriend).

exploitation and that they all deserve protection.²⁵⁴ The same is true for self-produced child pornography and subjects of such images deserve protection from the victimization of the circulation of those images.

Fifth, such an approach ignores the fact that this activity floods the marketplace with exponentially more images of child sexual exploitation. Research indicates pornographic images of children are used to validate offenders' activities, groom children, desensitize children, and fuel offender fantasies and crimes against children.²⁵⁵ Equally insidious, this flooding of the market desensitizes all to the ongoing commoditization of children as sexual objects for the benefit of adult sexual arousal.²⁵⁶

2. *De Facto Decriminalization*

Illegal behavior can be decriminalized explicitly or implicitly. The latter can take the form of leaving a statute in the criminal code, but following a policy not to prosecute it. Professor Smith argues for such an approach. Recognizing that this behavior is illegal and harmful, he also believes it should not be completely decriminalized because "[t]here is a salutary, albeit limited role for the criminal law to play here"²⁵⁷ Professor Smith discusses, without a clear vision on how to enforce such a regime, that "com[ing] up with a comprehensive vision of when criminal law should, and should not, be used [is] "an unmanageable task."²⁵⁸ Such is not impossible, although it is difficult. It is a task that will always risk leading to an imperfect result but less imperfect than the alternative of threatening prosecution without the intent to use it. This alternative raises some concerns about the propriety of leaving a criminal law in place for the sole purpose of tricking juveniles and minors into thinking it will be used.²⁵⁹ Prosecution is not a decoy, but a serious governmental power.

Second, the ultimate result of this approach still possesses a dangerous characteristic: an ad hoc approach with no guidelines. Without objective criteria, Professor Smith offers several examples of possible

²⁵⁴ See e.g., *Raplinger*, 555 F.3d at 687.

²⁵⁵ Leary, *supra* note 137, at 13; Magaw, *supra* note 252, at 1; Internet safety expert Parry Aftab describes how sexting images are "sold on digital black market for use underground web sites where real child predators love to look at them." Gil Kaufman, *How Can You Avoid Sexting Dangers*, MTV.COM NEWS, Feb. 12, 2010, at 1.

²⁵⁶ E.g. Calvert, *supra* note 228, at 1.

²⁵⁷ Smith, *supra* note 140, at 541.

²⁵⁸ *Id.*

²⁵⁹ This is distinct from leaving criminal laws in place and not using them on certain occasions as such is a recognized power of the executive prosecutor. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

prosecutable scenarios. He discusses using prosecution as “leverage to convince minors to cooperate with law enforcement in the apprehension and prosecution of pedophiles and sexual predators.”²⁶⁰ Although surely not his intention, his proposal suggests that the government manipulate children who are already vulnerable to exploitation by threatening prosecution unless they become witnesses for the government.²⁶¹ This is problematic because this description indicates an intent to threaten juveniles who produce pornography and may be the victims of adult grooming and coercion. Under the structured prosecutorial discretion proposal, such a juvenile would categorically never be considered for prosecution, because he would be a victim of exploitation. Perhaps Professor Smith means a case in which the circumstances of production are unclear, such as a juvenile with a history of victimization, but who then moves forward on his own to obtain other pictures. This leads to the third problem in his proposal: a lack of any objective factors to guide the prosecutor.

Without objective factors to guide prosecutors many questions remain. When is it “necessary to actually charge?” Why are only pedophiles and sexual predators worthy targets? What about coercive teen boyfriends,²⁶² juveniles making a profit in trading such images,²⁶³ or juveniles using the photographs to blackmail for sexual favors?²⁶⁴ In the end, *de facto* decriminalization and structured prosecutorial discretion would likely reach the same results: severe offenders would be

²⁶⁰ Smith, *supra* note 140, at 541.

²⁶¹ *Id.* “In those cases, prosecutors can threaten to charge (or, *if necessary*, *actually* charge) minors who created pornographic images of themselves unless they become witnesses for the government.” Presumably this was the motivation of Kurt Eichenwald, the New York Times reporter who uncovered the Justin Berry story. After the story was made public, it was later revealed that Eichenwald had paid Berry \$2,000 in the beginning of their relationship. Eichenwald had already resigned from the New York Times (neither party claimed that it was a result of this incident) which acknowledged this was a mistake. Corrections, The New York Times, Mar. 6, 2007, available at http://www.nytimes.com/2007/03/06/pageoneplus/corrections.html?_r=2&oref=slogin&oref=slogin. Presumably this was a mistake for a number of reasons, not limited to journalistic integrity. But it also raised questions about the propriety of paying a previous exploitation victim for the greater goal of exposing this underworld.

²⁶² *Supra* note 16.

²⁶³ Hill, *supra* note 249.

²⁶⁴ BOWLES, *supra* note 21. An additional paradigm is suggested by Professor Calvert who notes that while the images fall under the definition of child pornography, he feels that the initial production produces no harm and therefore does not fall under *Ashcroft*. Calvert, *supra* note 228, at 47. However, he acknowledges there is much potential harm after the image is captured (ridicule, embarrassment, loss of potential employment) and there is a role for targeting those who forward such images downstream. *Id.* at 62.

adjudicated, and non-severe offenders would be diverted. However, Professor Smith suggests no guidance in determining which targets are worthy and which are not. Structured prosecutorial discretion suggests objective guidance to prevent inconsistent prosecutions.

Professor Smith also allows for threatening prosecution “to convince recalcitrant minors who have made or distributed pornographic images of themselves in the past to cease and desist and help remedy the situation...**Threats of prosecution can be effective** means of persuading minors to surrender, [i.e.] for [destroying] any pornograph[y] they have made themselves, as well as to identify the persons to whom they distributed images.”²⁶⁵ As a threshold matter, our policies are driven by a shared concern for such a child who is refusing to alter his destructive behavior, notwithstanding its harm and illegality. How effective this policy of threatening prosecution, without actually intending prosecution, remains unclear. The harder question is what to do when all society’s efforts at prevention and remediation fail. Structured prosecutorial discretion is part of a multidisciplinary approach that includes prosecution under certain outlined circumstances, perhaps those identified by Professor Smith. Professor Smith proposes a policy against prosecution, reserving its threat only for a narrow group of cases that are not identified beforehand.

Presumably, this is not an exhaustive list of when Professor Smith would threaten prosecution. He states, however, that what the potential cases on his list have in common are that prosecution would be of a last resort. Prosecution would be used to obtain compliance, and the criminal justice system would not punish minors but offer “therapeutic intervention.”²⁶⁶ This is a point on which we initially agree. Such a consideration of prosecution should be done with an eye toward protecting children, often the very children involved in the behaviors. There are two significant differences between our approaches. One is obvious. Professor Smith seems unwilling to actually execute the prosecution if it is merited. As such, its effectiveness is in question. Secondly, he offers no guidance as to when threatened prosecution is merited, except for a list of some examples. This is exactly what structured prosecutorial discretion seeks to avoid: an ad hoc approach to juvenile justice. Our children deserve a flexible, yet well considered approach to this complicated social issue; not a toothless threat which results in baseless threats or inconsistent results.

There is a final point of agreement with Professor Smith, while we propose two different ways of reaching the same conclusion. He acknowledges in two sentences that sometimes there are cases for which

²⁶⁵ Smith, *supra* note 140, at 541-42.

²⁶⁶ *Id.* at 542.

prosecution is allowable. “[M]inors who . . . actually coerce other minors into submitting to sex or allowing themselves to be filmed during sex should also be prosecuted. Despite their minority status, they – like adult offenders – fall within the exploitative paradigm of child pornography and deserve prosecution.”²⁶⁷ Professor Smith has a categorical agreement to prosecute (apparently either in adult or juvenile court) juvenile rapists or juveniles who use coercion to produce pornography. That same result would occur in applying the structured prosecutorial discretion factors: offender specific factors in favor of prosecution would be the cause behind the production (coercion); lack of amenability to rehabilitation, likelihood of rehabilitative success (and perhaps the frequency of exploitation). Offense specific factors would further support prosecution, including the circumstances around the exploitation, involvement of other juveniles, role of this juvenile in production, and severity of content. The difference is structured prosecutorial discretion recognizes the complications of these cases. Coercion is often subtle. Teen domestic violence is on the rise. Filming without consent is also troubling. Similarly, while it is unclear, Professor Smith does not mention on his list of possible youth at risk of prosecution the juvenile who receives the picture and when the relationship is over distributes it, or the seventeen-year-old youth who convinces without coercion the twelve-year-old to create the pictures.²⁶⁸ In short, a factor-based protocol helps with the more challenging cases.²⁶⁹

3. *Neither Form of Decriminalization is Adequate*

What is the proper response if child pornography prevention fails? Surely it rests not with any one social institution, including the prosecutor’s office. Society should embrace all the tools at society’s disposal, not eliminate one. While care should be taken to avoid registration of such juveniles as sexual offenders and to prevent inappropriate prosecutions, the proper solution is to develop prosecutorial policy and wisely employ prosecutorial discretion. Prosecutors should develop considered policies that establish protocols for the narrow circumstances when juvenile adjudication may be appropriate. Prosecutors should exercise their discretion to do so only

²⁶⁷ *Id.* at 543.

²⁶⁸ This is a similar scenario that has lead to two suicides. See Horn, *supra* note 226, at 1.

²⁶⁹ So at the close of these articles, it would appear that Professor Smith and structured prosecutorial discretion advocate for some form of a system that sees a role for prosecutors in a societal response, how large a role is an area of disagreement. We also share a motivation to help children who need it and a desire not to harm children in the name of helping them. See generally Smith, *supra* note 140; Leary, *supra* note 137. We are grateful to his work on behalf of children.

when necessary. However, decriminalizing such actions is an unrealistic measure of harm and a too blunt response to be effective.

4. *Diversion and Prosecutorial Discretion*

a. Structured Prosecutorial Discretion Within a Multidisciplinary Approach

On this spectrum of solutions the aforementioned structured prosecutorial discretion would be placed in the center. It is grounded in the recognition that the problem of self-produced child pornography is complex and covers a broad array of behaviors: from naively producing such images alone and sending them to an intended recipient, to coercing a child into sending such images, to viciously distributing such images to hundreds of people. This system assists offices in wading through the facts and seeks to afford prosecutors the flexibility to consider prosecution in only the most egregious of cases. It is also grounded in the purpose of the juvenile justice system – to protect and rehabilitate juveniles as well as prevent the harm of those images. It would allow prosecution to remain as part of a multidisciplinary response for only the more egregious offenders (such as vindictive distribution of the images, coercion of the victim, etc.) only after the implementation of offender-based and offense-based protocols are established. Prosecution would solely rest in juvenile court with an eye toward rehabilitation. Such juveniles would not be subjected to sex offender registration, mandatory minimums, or adult court. This prosecutorial responsibility would be part of a larger multidisciplinary effort with education, prevention, and diversionary programs. Moreover, in light of new proposed legislation, adjudicatory proceedings would not be limited to child pornography charges but also other misdemeanors or status offenses. This affirms the goals of child protection by recognizing the harm of this behavior, but also prevention of severe sanctions.

b. Concepts of Prosecutorial Discretion

One is comfortable with leaving prosecution on the table if one is comfortable with the existence of prosecutorial discretion. In other words, those concerned with any prosecution often are concerned with overzealous prosecution in which juveniles with limited culpability will suffer life-altering consequences far outweighing their *mens rea*. A case often used to champion this concern is *Miller v. Skumanick*.²⁷⁰ This case arose out of an investigation into students who were trading nude pictures of classmates on cell phones. It resulted in District Attorney Skumanick apparently threatening the children depicted in the images with felony child pornography charges, notwithstanding the lack of

²⁷⁰ *Miller v. Skumanick*, No. 09-2144, 2010 U.S. App. LEXIS 5501 (3d Cir. Mar. 17, 2010).

probable cause, unless they agreed to participate in an “education” program.²⁷¹ This program was originally several months long, required a fee, and demanded that they write essays about “how [their] actions were wrong” and “what it means to be a girl.”²⁷² Parents of three of the children objected in part because the photographs were not pornographic. The photographs ultimately at issue consisted of an old photo of Nancy Doe apparently exiting the shower wrapped in a towel just below her breasts.²⁷³ These families engaged the American Civil Liberties Union and sued Skumanick in federal court, obtaining a temporary injunction against prosecuting these girls, which was affirmed on appeal for one of the girls as the other claims became moot.²⁷⁴ They advanced three claims under 42 U.S.C. §1983: (1) that because these images were not obscene, they are protected speech and the threat to prosecute was “without a legitimate basis in an attempt to force the girls to abandon their constitutional rights and submit to the ‘re-education program,’ probation and drug testing;”²⁷⁵ (2) retaliation in violation of plaintiffs’ First Amendment right to be free from compelled speech; and (3) the parents brought an additional claim alleging “retaliation against the parents for exercising their Fourteenth Amendment substantive due process right as parents to direct their children’s upbringing.”²⁷⁶ The trial court, however, did not grant, nor did the Court of Appeals approve, the TRO because of a philosophical impropriety in charging the youth. In fact, both courts stressed the narrowness of their holdings²⁷⁷ not to

²⁷¹ *Id.* at *3.

²⁷² *Id.* at *5, **29-30.

²⁷³ *Id.* at *7. While other photos of two other girls were originally at issue, their cases became moot when prosecution was declined on appeal. *Id.* at **13-14.

²⁷⁴ *Id.* at *8, **29-30.

²⁷⁵ *Miller v. Skumanick*, 605 F. Supp. 2d 634, 640 (M.D. Pa. 2009). The Third Circuit described this claim arguably differently as “retaliation in violation of the minors’ First Amendment right to free expression.” 2010 U.S. App. LEXIS 5501, at *16. Plaintiffs, however, never claimed a First Amendment right to “sext.” Rather, they claimed that because “the photographs of the girls are not child pornography...the District Attorney’s threat to prosecute the girls under the child-pornography statute for posing for the photographs can have no purpose other than to retaliate against them for exercising their First Amendment right to free speech.” *Miller v. Skumanick*, 09-2144, Supplemental Brief for Appellees, at 7. Both courts refused to rule on this First Amendment claim and the Third Circuit struck the second cause of action, deciding in favor of plaintiffs on the third cause of action. 2010 U.S. App. LEXIS 5501, at *17 (declining to rule on the First Amendment claim to free expression in the photographs), at *18 (rejecting the First Amendment claim to refrain from compelled speech because the threat of prosecution occurred before the refusal and thus could not be a response to the speech), and at *22 (affirming the unconstitutionality of future prosecution as retaliation).

²⁷⁶ 605 F. Supp. 2d at 640; 2010 U.S. App. LEXIS 5501, at *17.

²⁷⁷ 605 F. Supp. 2d at 644 (describing the constitutional First Amendment right to refrain from expression and the Fourteenth Amendment right to be free from

address the claim of a First Amendment right to pose in the photos. The final Third Circuit ruling affirmed the TRO based only on the third cause of action alleging retaliation against the parents. The courts correctly questioned whether said photos fit under Pennsylvania's definition of child pornography and even if they did, there was no "semblance of probable cause" that the plaintiff transmitted the image.²⁷⁸

It appears that the prosecutor's error was in failing to differentiate between images involved, and failing to understand the distinction between "sexting" and self-produced child pornography. The sole successful claim was in the District Attorney's attempt to compel the Does to speak and to "impose on [the] children his idea of morality and gender roles" and then retaliating against them for exercising their right to be free from compelled speech by threatening prosecution without probable cause.²⁷⁹

While this case may be an example of overzealous prosecution, it is indeed the exception that proves the rule. Had structured prosecutorial discretion been applied these girls would have never been adjudicated for two reasons. First, the images are not child pornography. Second, an application of the factors would have weighed against adjudication.

Prosecutorial discretion and juvenile diversion have long been important components of our juvenile justice system. While the *Skumanick* case receives a great deal of media attention, the other more restrained uses of prosecutorial discretion demonstrate its successes. One characteristic of these successes is having objective factors to consider in

state interference in the upbringing of children but failing to address the First Amendment right to take the photos); 2010 U.S. App. LEXIS 5501, at *17 (declining to consider the issue of retaliation in violation of the First Amendment right to free expression); *Id.* at *32 n. 15 ("We note that the constitutionality of the sexual abuse of children statute is not at issue (at least directly) in plaintiffs' second and third causes of action; plaintiffs instead challenge the constitutionality of the prosecutor's act of bringing a prosecution (no matter what the statute) to punish them for asserting their constitutional rights.").

²⁷⁸ 2010 U.S. App. LEXIS 5501, at *35; 605 F. Supp. 2d at 645-46 ("While the court emphasizes that its view is preliminary and not intended to absolve the plaintiffs of any potential criminal liability, plaintiffs make a reasonable argument that the images presented to the court do not appear to qualify in any way as depictions of prohibited sexual acts. Even if they were such depictions, the plaintiffs [sic] argument that the evidence to this point indicates that the minor plaintiffs were not involved in disseminating the images is also a reasonable one."). The Pennsylvania definition of child pornography does include nudity if it is depicted for "purpose[s] of sexual stimulation or gratification of any person who might view such depiction[s]." 18 PA. CONS. STAT. ANN. § 6312(g) (West 2010).

²⁷⁹ *Id.* at **25-26, 29-30, 37-38.

evaluating cases. For example, Mathias Heck, the District Attorney in Montgomery County, Ohio recognized the conflict of legal doctrines posed by these behaviors, the harms of the images to subjects and others, and the high penalties to which they could be exposed. He created the Prosecutors Juvenile Diversion Program where juveniles “who are charged with sexting will be screened by a diversion officer . . . to determine if diversion from traditional juvenile court proceedings is appropriate.”²⁸⁰ Heck sees the value in a systemic approach and this program considers several factors including “whether the juvenile has any prior sexual offenses, whether any type of force or illicit substances were used to secure the photos, whether the juvenile has been involved in this particular diversionary program previously, and whether there is strong opposition by the victim”²⁸¹ The stated purpose of this program recognized both the social harm caused and the desire to not overly punish a juvenile: “to address first time offenders who engage in this behavior, but are unlikely to re-offend after being educated on the legal ramifications and the possible long term effects on the victim.”²⁸²

Such systemic-based efforts at prosecutorial discretion have received a great deal of support from prosecutors, as they are more the rule than the exception.²⁸³ Diversion has been implemented or favorably proposed informally or by statute in New Hampshire, Massachusetts, Indiana, New Jersey, Pennsylvania, Illinois, and other jurisdictions.²⁸⁴ Prosecutors have provided a range of responses including diversion programs for

²⁸⁰ Mathias H. Heck, Jr., *Sexting and Charging Juveniles: Balancing the Law and Bad Choices*, THE PROSECUTOR, at 2 (2009).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See, e.g., Lundquist, *supra* note 228; Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Lead Response to the Teenage Practice of Sexting*, 13(6) J. OF INTERNET L. 3 (2009) (describing it as a more workable framework).

²⁸⁴ See, e.g., Shira Schoenberg, “Sexting” Not on The Agenda; Teenagers Rarely Charged for Photos, CONCORD MONITOR Sept. 11, 2009, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20090911/FRO NTPAGE/909110319>; Ken Kosky, *It's the Law: Beware of Sexting*, NW TIMES, June 15, 2009, available at http://nwitimes.com/news/local/article_b0688b71-c5ef-58e2-ac62-1071da90cb5c.html; Chloe Gotsis, *Question and Answer With Middlesex District Attorney Gerry Leone*, BILLERICA MINUTEMAN, Apr. 1, 2009, available at <http://www.wickedlocal.com/billerica/news/x1098981792/Question-and-Answer-with-Middlesex-District-Attorney-Gerry-Leone>; *New Tack in Fight Against Teen Sexting*, THE STAR LEDGER, July 21, 2009; Matthew Kemeny, *Prosecutors Attack Sexting with Education, Discretion*, THE PATRIOT NEWS, Jan. 16, 2010, at A01 (discussing consent decree program and community education options used by prosecutor.). See also H.B. 4583, 96th Gen. Assem., 1st Reg. Sess. (Ill. 2009); S.B. 1121, 193d Gen. Assem., Reg. Sess. (Pa. 2009).

first offenders²⁸⁵ or mediation as an alternative to charges.²⁸⁶ Legislation proposed in New Jersey and Pennsylvania and current laws in Vermont legislatively mandate different forms of diversion programs by statute.²⁸⁷ Virginia rejected legislation in part because discretion should remain with the Commonwealth's elected prosecutors.²⁸⁸

All of these programs demonstrate promise. They speak to the concerns of many and attempt to balance the harm these images cause with the reality of juveniles' decreased culpability in certain situations. They, however, also have promise because they are neither blanket approaches nor vague policies. Rather, consistent with structured prosecutorial discretion, they encourage a case-by-case analysis based on objective systemic factors to ensure the even-handed application advocated in structured prosecutorial discretion.

5. New Statutes

a. Balancing Concerns About Adjudication with Concerns About Exploitation

At the time of this writing numerous states have considered legislation and, according to the National Conference of State Legislators at least fifteen states have proposed or passed "sexting" or self-produced child pornography related legislation.²⁸⁹ One of the original voices of decriminalization of self-produced child pornography was Vermont. Originally, some legislators in Vermont drafted legislation to exempt this form of production and dissemination from any prosecution. Vermont then saw the negative social and legal repercussions of decriminalization and passed alternative legislation directly aimed at this behavior. Consistent with structured prosecutorial

²⁸⁵ See Gotsis, *supra* note 284; Jeff Frantz, *York County DA Backs Sexting Reform*, THE YORK DAILY RECORD, Jan. 9, 2010, (on file with The Virginia Journal of Social Policy & the Law) (quoting a prosecutor noting "Prosecutors have used their discretion to come up with a 'common sense' solution for high schoolers who might not understand the ramifications of sexting . . . but freelancing is not something prosecutors like . . .").

²⁸⁶ Joyce Edlefsen, *Mediation an Alternative to Lawsuits*, STANDARD JOURNAL, Jan. 12, 2010, available at <http://www.rexburgstandardjournal.com/articles/2010/01/12/news/49.txt>.

²⁸⁷ See *infra* notes 293 and 322 and accompanying text; see also SB § 1121 6321(f), 193rd Gen. Assem. Reg Sess. (Penn. 2009).

²⁸⁸ *Virginia Panel Refuses to Recommend Legislation Regarding Sexting*, WASH. POST, Dec. 15, 2009.

²⁸⁹ Pam Greenberg, 2010 Legislation Relating to "Sexting," (Mar. 15, 2010), The National Conference of State Legislatures, <http://www.ncsl.org/default.aspx?tabid=19696>. While not all statutes can be examined, what follows is a review of some trends. For a thoughtful analysis of four of the statutes see Weins, *supra* note 238, at 34-48.

discretion, it left adjudication on the table, but significantly limited its use for first offenses and precluded any form of sex offender registration.

Within a larger legislative overhaul, Vermont aimed at two specific targets: the minor who “knowingly and voluntarily and without threat or coercion use[s] a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person”²⁹⁰ and the recipient who possesses such an image from the producer.²⁹¹ The law further distinguishes between the first-time offender and subsequent offenders. This statute accomplishes many of the goals of structured prosecutorial discretion, characterizing a first-time offender as engaging in a juvenile act, that “shall be filed in family court and treated as a juvenile proceeding,”²⁹² not an adult offense. It also allows referral to a diversion program,²⁹³ prohibits prosecution for sexual exploitation of children and sex offender registration,²⁹⁴ and requires subsequent expungement of the delinquency finding.²⁹⁵

Laws such as this hold promise for a number of reasons. They afford prosecutors flexibility, albeit limited by a statute. Addressing key concerns expressed by both the original article and others, this appreciates the distinct roles in self-produced child pornography, i.e., producer, possessor, distributor, and recognizes that each role should not be treated the same. However, other factual distinctions, such as producing for profit, are not addressed. Vermont narrows its focus to the juvenile who sends his own image.²⁹⁶ The legislation recognizes that the possession of such an image may be the unfortunate luck of an unsuspecting minor, or it may be an indication of child sexual exploitation. Although, presumably, if one forwarded the image electronically, one could be prosecuted under Vermont’s dissemination of child pornography statute (if the image were child pornography), because the image is not of himself.²⁹⁷ Importantly, however, this new

²⁹⁰ VT. STAT. ANN. tit. 13, § 2802b(a)(1) (2010).

²⁹¹ *Id.* at § 2802b(a)(2). Notably, this statute seemingly does not affect possessors later in the distribution stream because it describes the possessor as possessing an image transmitted “in violation of subdivision (1)” which applies to the original producer. *Id.* at § 2802b(a)(2).

²⁹² *Id.* at § 2802b(b)(1). A subsequent offender may be adjudicated in family court or district court, but shall not be subject to sex offender registration. *Id.* at § 2802b(b)(3).

²⁹³ *Id.*

²⁹⁴ *Id.* at § 2802b(b)(2).

²⁹⁵ *Id.* at § 2802b(b)(4).

²⁹⁶ *Id.* at § 2802b(a)(2).

²⁹⁷ *Id.* § 2810(b).

Vermont legislation does not preclude prosecution under other statutes.²⁹⁸

b. Focus on Mens Rea

Similar to Vermont, North Dakota created a new offense regarding the “creation, possession, or dissemination of sexually expressive images.”²⁹⁹ It takes a different approach to examining the case-specific facts of each action, as well as the differing roles in “sexting” and self-produced child pornography including production, possession, and distribution.³⁰⁰ This approach focuses on the *mens rea* of the offender, making it a class A misdemeanor to, without written consent, “surreptitiously create[]” or “willfully possess[] a sexually expressive image that was surreptitiously created.”³⁰¹ Therefore, the statute itself appreciates the distinction between an image with the subject’s knowledge and without such. It also appreciates the damage that can be caused to the subject when an image is distributed by creating another class A misdemeanor that makes clear if one distributes or publishes a sexually expressive image “with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image” or after notice that the subject or guardian of the subject does not desire its distribution.³⁰² If one acquires or knowingly distributes such an image without consent of the subject, it is a Class B misdemeanor.³⁰³ Interestingly, North Dakota explicitly does not decriminalize other forms of self-produced child pornography possession or distribution. The new statute explicitly states the section “does not authorize any act prohibited by any other law” which would include child pornography laws.³⁰⁴ However, it does note that if the image is of a minor, but not in violation of the statute that prohibits visual representation of sexual contact by a minor, a parent or guardian, not the minor, may give permission to possess or distribute the sexually expressive image.³⁰⁵ Thus the statute highlights the distinction between images that meet the definition of child pornography and images that are sexual in nature, but not child pornography. However, nudity alone is insufficient to deny First Amendment protection.³⁰⁶ North Dakota’s definition of a sexually

²⁹⁸ *Id.* § 2802b(d).

²⁹⁹ N.D. CENT. CODE § 12.1-27.1-03.3 (2009).

³⁰⁰ *Id.*

³⁰¹ N.D. CENT. CODE § 12.1-27.1-03.3(1)(a).

³⁰² *Id.* at § 12.1-27.1-03.3(1)(b).

³⁰³ *Id.* at § 12.1-27.1-03.3(2).

³⁰⁴ *Id.* at § 12.1-27.1-03.3(3)(a).

³⁰⁵ *Id.*

³⁰⁶ See *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (nudity alone is insufficient grounds to limit speech).

expressive image includes a “nude” or “partially denuded human figure” which may raise First Amendment concerns.³⁰⁷

c. New Crimes

In contrast to Vermont, proposed legislation in Ohio took a very direct route to the problem of self-produced child pornography. Avoiding the question of whether such behavior should be treated as child pornography or not, it proposed new crimes. The Ohio proposal specifically designated the crime a delinquent act and a misdemeanor.³⁰⁸ This particular proposal states: “No minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other materials that shows a minor in a state of nudity.”³⁰⁹ The Ohio proposal further explicitly states that it shall be no defense that the pictures produced are that of the accused.³¹⁰

This proposal, although brief is comprehensive. It encompasses the entire range of actions associated with self-produced child pornography including production, distribution, and possession. By utilizing the *mens rea* term “recklessly,” it acknowledges the more common mental state of offenders. The term “nudity” is broader than “sexually explicit conduct.” Therefore, the proposal is not limited to depictions of sexual activity, and that may lead to First Amendment litigation, depending on how “nudity” is interpreted.³¹¹ Finally, by limiting the jurisdiction to juvenile delinquency proceedings, the proposal accomplishes structured prosecutorial discretion’s goal, if prosecution is pursued, by limiting prosecution to juvenile court.³¹²

³⁰⁷ N.D. CENT. CODE §12.1-27.1-01(13).

³⁰⁸ H.B. 132, 128th Gen. Assem., Reg. Sess. § 2907.324(C) (Ohio 2009-10).

³⁰⁹ *Id.* § 2907.324(A).

³¹⁰ *Id.* § 2907.324(B).

³¹¹ See *Osborne v. Ohio*, 495 U.S. at 112 (nudity alone is insufficient grounds to limit speech).

³¹² For an insightful analysis of four newly proposed statutes, see Weins, *supra* note 238. In this piece, Professors Weins and Hiestand challenge the adequacy of utilizing affirmative defenses or exceptions to existing laws and propose a model statute that seeks to “provide[] appropriate, limited avenues of prosecution, without the unintended consequences of narrow exceptions. It uses a low, base-level juvenile charge, with aggravating factors for more serious behaviors.” *Id.* at 48. Their approach shares the aforementioned goals or structured prosecutorial discretion: i.e. allowing the flexibility to pursue the most severe cases, but minimal exposure to the “lowest level” cases. Having a particular concern about overzealous prosecution, they seek this not through use of pre-charging factors, but through the availability of aggravating factors in charging to assess the situation.

6. Multidisciplinary Responses

Fortunately, this is an issue that has received a multidisciplinary response, including education programs,³¹³ school policies and procedures,³¹⁴ and technology advancements.³¹⁵ As with the structured prosecutorial discretion model, several jurisdictions recognize the need to educate all segments of the community, including children, parents, law enforcement, and education personnel, on the dangers and legal consequences of this behavior as an important prong of the solution.³¹⁶ Many prosecutors have partnered with Internet safety initiatives to educate communities.³¹⁷

³¹³ See, e.g., Julie Carey, *Back to School, Back to Sexting*, NBC WASHINGTON, Sept. 30, 2009, available at <http://www.nbcwashington.com/news/local-beat/Back-to-School-Back-to-Sexting-62990402.html> (discussing a Virginia educational campaign and training for school resource officers and principals), Adam Bowles, *Montville schools study cyberharassment, 'sexting'*, NORWICH BULLETIN, Sept. 30, 2009, available at <http://www.norwichbulletin.com/news/x1699607602/Montville-schools-study-cyberharassment-sexting>; Corbett, *supra* note 283, at 6.

³¹⁴ See, e.g., Emily Gueviera & Jemimah Noonoo, *Use of "Sexting" Benches Three Local Students*, BEAUMONT ENTERPRISE, Oct. 24, 2009, available at <http://www.beaumontenterprise.com/news/local/65892082.html>; *Pender County Student Faces Serious Charge After Sexting Incident*, WWAY, Sept. 10, 2009, available at <http://www.wwaytv3.com/node/18190> (school suspension); Sherryl Connelly, *No Sexting Students! Houston School District Bans Sexually Explicit Text Messages*, NY DAILY TIMES, Apr. 26, 2009, available at http://www.nydailynews.com/lifestyle/2009/08/26/2009-08-26_no_sexting_students_houston_school_district_bans_sexually_explicit_text_messages.html.

³¹⁵ See e.g., Lundquist, *supra* note 228 (discussing parental software for children's cell phones which allows parents to monitor some behavior); Julie Nightingale, *E-Safety Moves Centre Stage on School IOT Agendas*, GUARDIAN, Jan. 13, 2010, available at <http://www.guardian.co.uk/resource/safety-moves-centre-stage> (describing different technology efforts to increase safety).

³¹⁶ E.g. William Clark, *Internet Safety Initiative in Rural New Jersey*, 43 THE PROSECUTOR 46 (Dec. 2009) (describing adding "sexting" to model education curriculum which was developed through a partnership among state police, county prosecutors, nonprofit organizations, Salem Community College, and private industry); Ronelle Grier, *Teen Sexting: Technological Trend Can Lead to Tragic Consequences*, THE OAKLAND PRESS, Jan. 24, 2010, available at <http://www.theoaklandpress.com/articles/2010/01/24/news/doc4b5b6bd5eca3d856369356.txt>.

³¹⁷ See, e.g., *id.* Andrea Lopez, *Partnership Helps Parents Protect Children Online*, CBS4, Jan. 11, 2010, available at <http://cbs4denver.com/local/Partnership.Parents.Protection.2.1419596.html> (describing program with Colorado Attorney General and WebWise Kids aimed at educating parents); Shauna Marlett, *Online Dangers of Cyberbullying, 'Sexting' Discussed During Seminar*,

a. New Jersey

New Jersey's efforts to address this problem have sought the same goals as one Ohio proposal, but have taken a very different route.³¹⁸ As in many other jurisdictions, New Jersey has pending legislation that expands its definition of electronic means to reflect current technology by incorporating into its definition of electronic communication device, *inter alia*, telephones and any device with Internet capability.³¹⁹

Rather than solely proposing a new crime or the decriminalization of a former crime, New Jersey has approached the situation by way of creating a legislative diversion program. In Proposed Bill 4069, the legislature directs the Attorney General to "develop an educational program for juveniles who have committed an eligible offense."³²⁰ While this statute addresses the spectrum of behaviors, it treats as the same the self-production and the production by a juvenile of child pornography involving other juveniles. The legislature limited the program from the outset to juveniles without previous delinquency findings, without the intent to commit a crime, without the knowledge that their actions were illegal, and to juveniles who "may be harmed by the imposition of criminal sanctions" and those who would "likely be deterred" by

PRESS AND DAKOTAN, Nov. 18, 2009, *available at* <http://www.yankton.net/articles/2009/11/18/community/doc4b03946aa8078584815207.txt> (educators researchers, Internet safety advocates, and law enforcement join to present education forum); Patricia Villers, *Officials Warn Parents of Sexting Dangers*, NEW HAVEN REGISTER, Oct. 8, 2009, *available at* <http://www.nhregister.com/articles/2009/10/08/news/valley/b1-shsexting.txt> (lawmakers sponsor educational panel to address changing technology).

³¹⁸ One will recall a rather infamous New Jersey case of self-produced child pornography involving a fourteen-year-old girl who posted pictures of herself on the Internet for her adult boyfriend. Because of the age of the juvenile, this case was particularly disturbing, both in the behavior of the youth as well as in the potential consequence of a felony conviction. Associated Press, *Girl Posts Nude Pics, is Charged With Kid Porn*, MSNBC, Mar. 27, 2009, *available at* <http://www.msnbc.msn.com/id/29912729/>.

³¹⁹ H.B. 3754 (1)(b), 213th Leg., §2 (N.J. 2009).

³²⁰ H.B. 4069 (1)(b), 213th Leg., §2 (N.J. 2009). Such an offense involves: "(1) the creation, exhibition or distribution without malicious intent of a photograph depicting nudity . . . through the use of an interactive wireless communications device or a computer; and (2) the creator and subject of the photograph are juveniles or were juveniles at the time of its making." H.B. 4069 (1)(b), 213th Leg., §2 (N.J. 2009). This is not novel. In Great Britain the government made "e-safety" a statutory element in the primary curriculum for 2011. Nightingale, *supra* note 315. Similarly, a proposed Pennsylvania Senate bill allows a court after conviction (presumably they mean adjudication) or in relation to a pretrial diversion, to order the youth to engage in an education program. SB 1121 § 6321(e)-(g), 193rd Gen. Assem., Reg. Sess. (Penn. 2009). See S.B. 2926 (1)(b), 213th Leg., Reg. Sess. § 2 (N.J. 2009).

engaging in the program.³²¹ The statement of the proposed legislation explicitly acknowledges that the bill “establishes an educational program that is intended to be an alternative to prosecution for juveniles who are charged with a criminal offense for posting sexually suggestive or sexually explicit photographs.”³²²

This proposal does seem to accomplish the goal of utilizing juvenile prosecution only as a last resort and considers factors as to who should benefit from a diversion program and who should not. However, the triggering factors regarding previous delinquency finding and risk that one “may be harmed” by prosecution do not seem to be tied to the important considerations of such behavior. Juveniles who “may be harmed” by criminal prosecution would include all juveniles. While it would be preferable to see research-based criteria, that may be accomplished with an additional provision in the statute. While the statute limits who is eligible for the program, once that hurdle is met, the statute does leave it to the discretion of the prosecutor whether the facts and circumstances surrounding the particular event warrant diversion.³²³ This fortunately gives the discretion to the body most familiar with the facts of the case rather than legislatively mandating it. Although the statute covers many different situations, including situations in which a juvenile may victimize another, by ultimately giving the authority to the prosecutor, inequities can hopefully be avoided.

The New Jersey proposal recognizes the long-term harm of such behaviors. The education program must include, as a matter of law, information concerning the legal and non-legal consequences³²⁴ of sharing sexually suggestive photographs, as well as long-term unforeseen consequences of such behavior.³²⁵ The proposal recognizes that “the unique characteristics of cyberspace and the Internet can produce long-term and unforeseen consequences for sexting and posting such photographs.”³²⁶ The Pennsylvania senate proposed a similar education program but also includes teaching about the connection between bullying and sharing such pictures.³²⁷

New Jersey also seeks to address this problem from the prevention side as well. Proposed House Bill 4070 requires sellers of cellular equipment to include with new or renewed contracts a brochure that

³²¹ S.B. 2926, 213th Leg., Reg. Sess. § 2 (N.J. 2009).

³²² S.B. 2926, 213th Leg., Reg. Sess. §2 (N.J. 2009) (Statement).

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* The non-legal consequences include, but are not limited to effects on relationships, loss of educational opportunities, and barring from extracurricular activities. *Id.*

³²⁶ *Id.*

³²⁷ SB 1121 § 6321(g), 193rd Gen. Assem., Reg. Sess. (Pa. 2009).

informs the individual about “the dangers of the practice known as “sexting.”³²⁸ The legislation directs the director of the division of Consumer Affairs in the Department of Law and Public Safety to draft the brochure.³²⁹ Said brochure must include the criminal penalties associated with this activity and contact information for officials and non-profit organizations qualified to field questions on this behavior.³³⁰

b. New York

Like New Jersey, New York appears to be considering a response to this behavior that continues the illegality of producing child pornography, but seeks to educate youth regarding the consequences. New York shares the recognition that the harm in this behavior rests in the fact that it is perpetual imagery on the Internet, more so that the posing itself.

This bill would require the office of children and family services to establish an educational outreach program to promote the awareness of the potential long-term harm to adolescents’ privacy that may arise from text messaging, emailing, or posting on the internet images and photographs of themselves that are provocative in nature.³³¹

The Bill actually goes further than noting the dangers of production and dissemination of such material and discusses the dangers of possessing such images. Like most other states, the images of concern are defined broadly to include “provocative or nude images.”³³²

The proposed legislation seeks a broad educational campaign. The proposal further recognized the need of all sectors of society to respond to this activity by specifically promoting “coordination of public and private efforts, including but not limited to efforts of educators, community organizations and other groups, to provide educational outreach programs to adolescents and their parents and caregivers, emphasizing such potential long-term harm.”³³³

c. AWARE Act and SAFE Internet Act

Proposed in the House of Representatives is the Adolescent Web Awareness Requires Education Act (AWARE) and pending in the Senate

³²⁸ H.B. 4070, 213th Leg., §2 (N.J. 2009).

³²⁹ *Id.*

³³⁰ N. J. H.R. 4070 (Statement).

³³¹ S.B. 5680, 232d Leg., Reg. Sess. (N.Y. 2009) (Memorandum).

³³² S.B. 5680 §1(16), 232d Leg., Reg. Sess. (N.Y. 2009-10).

³³³ N.Y. S.B. 5680 §1(16)(a)(11).

is the School and Family Education About the Internet Act (SAFE Internet Act).³³⁴ Similar to New York, the acts seek to address this and other issues through grant monies aimed at Internet Crime awareness and cybercrime prevention. The House legislation prioritizes grants to entities that identify and target children at risk of engaging in cybercrimes or becoming crime victims.³³⁵ Its sponsor, Congressman Wasserman Schultz described it as establishing a “competitive grant program so that non-profit Internet safety organizations can work together with schools and communities to educate students, teachers and parents about these online dangers.”³³⁶ Similarly, the Senate proposal seeks to establish competitive grants to promote Internet Safety and develop more research in youth online safety and in “the creation of problematic content by youth.”³³⁷

7. Expansion of Current Laws³³⁸

a. Nebraska’s Affirmative Defense

Nebraska expanded its child enticement crimes to include child enticement by electronic communications device.³³⁹ However, like Vermont, Nebraska discussed decriminalizing child pornography offenses for self-produced child pornography among juveniles. With regard to possessing such images, Nebraska amended its laws to make an affirmative defense to possession of a visual depiction of sexually explicit conduct if the image depicts only the defendant.³⁴⁰ Regarding the possession of such a picture by another, the statute creates a second affirmative defense.³⁴¹

³³⁴ H.R. 3630, 111th Cong. (2009); S. 1047, 111th Cong. (2009).

³³⁵ H.R. 3630 § 2(c)(1).

³³⁶ *Testimony before the H. Comm. Subcomm. On Crime, Terrorism, and Homeland Security*, 111th Cong. (Sept. 30, 2009) (testimony of Rep. Debbie Wasserman Schultz).

³³⁷ S. 1047 § 2(12)(A)-(B).

³³⁸ In addition to these changes in the criminal law, this behavior has lead to a variety of civil law suits. For a discussion of some of them see Corbett, *supra* note 283.

³³⁹ NEB. REV. STAT. § 28-320.02(1) (2009).

³⁴⁰ NEB. REV. STAT. § 28-813.01(3)(a) (2009).

³⁴¹ (i) The defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce

The amendments make the similar provisions for production of such material affirmative defenses if the image is of the juvenile alone.³⁴² Regarding dissemination, the statute creates an affirmative defense for a juvenile who sends such an image only of the juvenile himself to another if the other is at least fifteen years old and the juvenile has a “reasonable belief” that it is being sent to a “willing recipient.”³⁴³

Thus, for the offender of concern in the simple case of distributing some pictures of oneself to a limited audience, the youth who creates a picture of him or herself alone, there is an affirmative defense. Similarly, for the one who receives said image and is less than nineteen years of age and played no role in coercing the child to send the picture, there is also a defense.

While this legislation is more precise than others, it is not ideal. In an era when we are learning more about teen domestic violence, this statute may allow an older, dominating eighteen-year-old to “request” such an image from a fifteen-year-old and avoid prosecution. However, in this Nebraska legislation, there is not any defense to forwarding the image to others. This, correctly then distinguishes the unknowing recipient from the distributor.³⁴⁴ It also arguably decriminalizes this

the child in the visual depiction to either create or send the visual depiction. *Id.* at § 28-813.01(3)(b).

³⁴² NEB. REV. STAT. § 28-1463.03(5) (2009).

³⁴³ *Id.* at § 28-1463.03(6).

³⁴⁴ Other legislative action in this area includes amending current law to recognize this form of electronic communication in the state’s criminal code. For example, Colorado has expanded its Computer Dissemination of Indecent Material to Child and Internet Luring statute to include use of a telephone network or data network. COLO. REV. STAT. ANN. § 13-21-1002(1)(a) (2009); COLO. REV. STAT. ANN. § 18-3-306(1) (2009). This addition of the telephone and data networks appears to be part of a larger statutory effort to add these networks to numerous offenses in a bill entitled “Concerning the Use of Messaging Systems To Commit Unlawful Activity.” H.B. 09-1132, 67th Gen. Ass., 1st Reg. Sess. (Colo. 2009). While the statutory revision goes beyond self-produced child pornography, it clearly encompasses it. While Oregon expanded its definition of “Online Communication” in its Sexual Corruption of a Child statutes, to include both “telephone text messaging” and “transmission of information by . . . cellular system,” this statute requires the defendant to be eighteen years old and ask the juvenile to engage in sexually explicit conduct. OR. REV. STAT. § 163.431(2) (2009). Therefore, it does not directly impact the question of juveniles who self produce pornography, although it does address an important aspect of online luring. Utah expanded the crime of Sexual Exploitation of a Minor to include, not only the production, distribution or possession of child pornography, but the viewing of it as well. UTAH CODE ANN. § 76-5a-3(1)(a) (2009).

behavior for certain juveniles, thus possessing all the flaws of decriminalization.³⁴⁵

b. Other Jurisdictions Recognizing the Issues

As predicted in the original article, this activity rose at an alarming rate. As a result, prosecutors would be forced to address the situation. As discussed, some states have left the discretion to the prosecutor, others have not. Indiana's Senate passed a resolution which recognizes the problem and seeks more information to guide any legislative action. Two opposing bills are pending in the legislature and they recently decided to delay passage until they could consider all the ramifications. The Senate bill seeks to follow the Vermont example and create a misdemeanor for juvenile court.³⁴⁶ Recognizing that "mental and sexual development of individuals as related to criminal offenses must be studied in depth to ensure that our criminal justice system remains fair and equitable," the Senate passed a resolution regarding self-produced child pornography.³⁴⁷ It urges the legislative council to assign to the sentencing policy study committee, *inter alia*, "the use of cellular telephones to send explicit photographs and video ('sexting'), especially by children."³⁴⁸ The resolution also urges study of psychology of sexual development and mental development of children and its affect on judgment.³⁴⁹ After considering the results of the study, the resolution directs the sentencing policy committee to consider revision of statutes affected by the results.³⁵⁰ Legislation is delayed due to concerns that the proposed statute will create a loophole for sexual offenders.³⁵¹

³⁴⁵ See *supra* Part V.B. 1-3.

³⁴⁶ Eric Berman, *Legislative Committees to Take Up Sexting Bills Tuesday*, WIBC NEWS, Jan. 25, 2010, <http://www.wibc.com/news/Story.aspx?ID=118853>.

³⁴⁷ S. Res. 90, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009).

³⁴⁸ S. Res. 90, 116th Gen. Assem., 1st Reg. Sess. § 1(1) (Ind. 2009).

³⁴⁹ S. Res. 90, 116th Gen. Assem., 1st Reg. Sess. § 1(2)-(4) (Ind. 2009).

³⁵⁰ S. Res. 90, 116th Gen. Assem., 1st Reg. Sess. § 1 (Ind. 2009). Conversely, "The Virginia State Criminal Commission heard options for making 'sexting' a crime but refused to recommend legislation, calling the issue a 'minefield.'" *Crime Commission Opts Not to Back 'Sexting' Sanctions*, VA. LAWYERS WEEKLY, Dec. 21, 2009, available at <http://valawyersweekly.com/blog/2009/12/21/crime-commission-opts-not-to-back-'sexting'-sanctions/>. After reviewing the proposals, "[m]ost Commission members said the issue was best left to the state's 120 elected prosecutors." New Hampshire similarly rejected a change in law out of concern that predators would have more opportunities to exploit children and a recognition that prosecutors were using their discretion with prosecution of juveniles. See generally Shira Schoenberg, *'Sexting' Not on the Agenda*, CONCORD MONITOR, Sept. 11, 2009.

³⁵¹ *Indiana Sexting Law Delayed*, ABC 7 NEWS, Feb. 17, 2009, <http://abclocal.go.com/wls/sotry?section=news/local/indiana&id=7282340>.

VI. CONCLUSION

Whenever a child exploits him or herself, or another, it is a tragedy. Whenever images of children engaged in sexually explicit conduct reach the marketplace where they will be distributed throughout the globe without any control of the subject child, it is a tragedy. Whenever children or adults are exposed to such images and the effect of them is to desensitize them to the sexual exploitation of children,³⁵² it is a tragedy. When a juvenile does an immature but devastating criminal act, injuring another, it is also a tragedy.

Society is called upon to protect children. All facets of society have a role in this response, and no one facet can be the entire solution. The law has a role to play when the law is broken. In the words of John Stuart Mill, the law is required to protect children “against their own actions as well as against external injury”³⁵³ This is aided by affording prosecutors the power necessary to secure protections, but also the flexibility to exercise discretion in a considered and systemic way.

The original structured prosecutorial discretion proposal in 2007 directed prosecutors to such a solution, but in the context of a multidisciplinary societal response with education, prevention, technological partnerships all playing an important role. Today, many jurisdictions have adopted such an approach, recognizing that there is a role for prosecutors in a multidisciplinary approach to a complex social problem. The development of some of the new legislation works positively in hand with structured prosecutorial discretion to create the most flexible but well considered approach. Scholars and commentators have joined the discussion to help society find balance. With their work, it is hoped that this response will make a positive contribution to assisting in avoiding further harms and tragedies. While the success remains to be measured, to do nothing leads only to further tragedy for those involved when they become adults.

³⁵² Del Quentin Wilber, *Child Porn Cases Take Toll on Investigators*, WASH. POST, Dec. 1, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113004032> (documenting harm of exposure to child pornography).

³⁵³ JOHN STUART MILL, ON LIBERTY 81 (David Bromwich and George Kate eds., Yale Univ. Press 2003) (1859).